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No. 381

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, *et al.*, *Appellees*.

**On Appeal from the United States District Court for the Northern District of California, Southern Division**

## JURISDICTIONAL STATEMENT

RANDOLPH KARR
*Attorney for Northwestern Pacific Railroad Company*
670 Pacific Electric Bldg.
610 South Main Street
Los Angeles, Calif. 90014

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**On Appeal from the United States District Court for the Northern District of California, Southern Division**

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## JURISDICTIONAL STATEMENT

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Appellant, Northwestern Pacific Railroad Company, appeals from the judgment of the United States District Court for the Northern District of California, Southern Division, entered April 17, 1964, dismissing

appellant's complaint to set aside an order of the Interstate Commerce Commission, dated May 22, 1963, denying Northwestern Pacific Railroad's request to abandon 2.465 miles of railroad line in Marin County, California. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW

The opinion of the District Court is reported at 228 F. Supp. 690. A copy of the opinion and judgment is attached hereto as Appendix A. A copy of the report and order of the Interstate Commerce Commission in *Northwestern Pacific Railroad Company Abandonment Between San Rafael and Forbes Overhead (Puerto Suello Tunnel), Marin County, California*, 320 I.C.C. 19 (1963), is attached hereto as Appendix B. A copy of the report and order recommended by the Hearing Examiner is attached hereto as Appendix C.

## JURISDICTION

This suit was brought under 28 U.S.C. Section 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on April 17, 1964, and notice of appeal was filed on June 15, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial

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[1] In the decision of the Interstate Commerce Commission (320 I.C.C. 20), it was set forth:

> "We are in accord with the examiner's findings of fact and ultimate conclusions thereon, which we adopt as our own and will not restate except to the extent necessary for clarity or amplification . . .

Code, 28 U.S.C. Section 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Colorado* v. *United States*, 271 U.S. 155 (1926), *United States* v. *State of Idaho*, 298 U.S. 105 (1936), *United States* v. *Hancock Truck Lines*, 324 U.S. 774 (1945).

## STATUTES INVOLVED

Section 1 (18-21) of the Interstate Commerce Act, 49 U.S.C. 1 (18-21) is set forth verbatim in Appendix D hereto.

## QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission erred in holding a railroad must rebuild a burnt out tunnel at substantial expense, where the cost will exceed two years' net revenue, when the railroad business in the area is declining, and in a territory that has little or no industrial or carload future.

2. Whether the District Court correctly held the constitutional fact doctrine of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920), is not applicable, and whether the District Court correctly held the order of the Commission is not confiscatory.

3. Whether the net loss doctrine is applicable where the past and present revenues are considered, in view of the future lack of potentials in that the railroad business in the area involved in the abandonment has been declining, there is little or no industrial future, and where alternate means of transportation service is available or provided.

4. Whether the parent company, Southern Pacific Company that already has advanced over $48,000,000

to keep the appellant Northwestern Pacific Railroad Company in operation, can be excluded from the picture, when substantial sums of money must be advanced to rebuild the tunnel in question.

5. Whether the Interstate Commerce Commission can require the railroad to rebuild the burnt out tunnel and maintain a route for the benefit of another railroad, The Atchison, Topeka and Santa Fe Railway Company:

(a) when the Santa Fe route that connects with appellant's is uneconomic; and

(b) when there was no obligation for all time to maintain through routes and joint rates.

6. Whether the District Court correctly applied the tests enumerated in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951), in determining:

(a) there is a continuing need for rail service in the area affected:

(b) the abandonment would adversely affect the shipping public;

(c) no long-run losses would be incurred by appellant in its overall system;

(d) that appellant is financially able to restore the tunnel;

(e) in omitting to include as one of the relevant matters the cost of reconstructing the railroad due to the relocation and expansion of the adjacent state freeway, omitting to apply the doctrine of *Purcell v. United States*, 315 U.S. 381 (1942).

## STATEMENT

Appellant is operating a railroad in interstate commerce in California from a point near the Oregon border along the coastal area of northern California to San Francisco Bay. From the north, the line runs south to Ignacio, a town in northern Marin County, approximately twenty-five miles north of San Francisco. At Ignacio the line splits, and before the tunnel fire most of the freight cars were routed from Ignacio to Schellville, a town on the northern edge of San Francisco Bay, where appellant interchanges cars with its parent Southern Pacific Company, which in turn interchanges cars with other railroads including the Atchison, Topeka and Santa Fe Railway Company at various places. The other branch of appellant's line runs south from Ignacio, through Tunnel No. 4 (also known as Suello Tunnel) to Tiburon, a point directly across the Bay and north of the City of San Francisco. At Tiburon the Atchison, Topeka and Santa Fe Railway ferries the cars by barge to either Richmond in the East Bay area or to San Francisco. On July 20, 1961, two juveniles set fire to Tunnel No. 4, and as far as can be determined, the entire tunnel was destroyed by cave-ins. The tunnel was one of two routes to southern Marin County, the other being the Santa Fe barge system via Tiburon. Since the fire, rail service to and from the area south of the tunnel has been exclusively by means of the Santa Fe ferry to Tiburon where cars are interchanged with appellant. From the point of tunnel collapse to Tiburon is approximately 10.5 miles. Only freight operations are conducted in the area in question.

On August 21, 1961, appellant requested the Interstate Commerce Commission under section 1(18)-(21)

of the Interstate Commerce Act for authority to abandon the burnt out tunnel and its approaches.

On September 17, 1962, the report and order recommended by the hearing examiner was served, recommending that the application be denied (Appendix C).

Thereafter, on May 22, 1963, the Interstate Commerce Commission issued its decision which was served June 5, 1963, denying the application of appellant to abandon the portion of its line in question. The decision is reported at 320 I.C.C. 19 (Appendix B).

The appellant then filed an action in the District Court to set aside the order of the Interstate Commerce Commission which order denied appellant's request to abandon the burnt out tunnel and its approaches. The District Court denied the petition to enjoin, annul and set aside the order of the Commission, and dismissed the complaint. (Appendix A)

The unusual feature of this matter is that the tunnel collapse has occurred and the line in question exists and is serving people as it will continue to exist and serve people if the application to abandon is granted. This is the opposite of the ordinary abandonment case. The other phase of this situation is that substantial sums of money will have to be expended to rebuild the tunnel if the Commission's order denying abandonment stands, and this phase of the matter brings into focus the substantial questions discussed hereafter.

## THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are of substantial importance to the Commission's administration of the Interstate Commerce Act and its approach to rail abandonments. The questions presented are of vital economic significance to the railroad industry.

The burning and collapse of the tunnel (10½ miles north of Tiburon) in the mountain pass immediately north of San Rafael was a serious matter. The cost to rebuild the tunnel will exceed $850,000, and exceed the previous two years' net revenue of appellant. The Interstate Commerce Commission sustained its order that the line should not be abandoned by finding that the segment of the railroad in question was operating at a small profit. This finding was based on the operations of the three years preceding the tunnel fire. The Commission and Court have looked only to the past revenues and business, not the future potential, or as appears in this matter, the fact that there is little or no industrial or carload future.

The question of prime importance to the railroad industry is whether the Interstate Commerce Commission and the Courts may ignore and disregard the economic future. The District Court found the area served, "is primarily a residential suburb of San Francisco, consisting of many small towns and villages." (228 F. Supp. 692.) The evidence was uncontradicted, the land values are too high to attract carload industries or shippers, and the amount of carload business was decreasing in the preceding three years.

The Commission in its decision took the revenue of the whole system, not the area where the line was sought to be abandoned, and said the system revenue of previous years was an "indication that the need for transportation in the area is not undergoing an immediate decline." (320 I.C.C. 23.) If such a doctrine is true, and it is not, then no portion of a line could ever be abandoned of a railroad where there was a system net. (See *Colorado* v. *United States*, 271 U.S. 153 (1926), and *Southern Railway Co.* v. *North Carolina*, 376 U.S. 93 (1964)).

The Commission in using only past system revenues to determine if a particular segment of the line is undergoing a decline, and ignoring specific evidence on the subject to the contrary was not only unsound but is of serious concern to all railroads.

There was a considerable volume of lumber and related products that moved from north of the tunnel to south of the tunnel to Tiburon where the cars were interchanged by appellant with appellee The Atchison, Topeka and Santa Fe Railway Company. Since the tunnel fire, these cars have been handled by appellant to Schellville where they are interchanged with the Southern Pacific Company, and then thereafter with appellee The Atchison, Topeka and Santa Fe Railway Company at various railroad junctions. The sole evidence was that the Tiburon interchange route was an uneconomic route for the appellee Santa Fe. It is of particular importance to the railroad industry to ascertain if substantial sums of money must be spent by one railroad to maintain an uneconomic route of another carrier.

Generally the only shippers or receivers of freight that are affected are three rock, sand and gravel operators, and some small lumber yards, who were using the rail service from north of the tunnel to south of the tunnel before the tunnel fire. The issue is whether they should be required to use, as they are now using, alternate truck service. Likewise, should the tunnel be rebuilt for their convenience where it appeared they were considering moving their businesses because of the proposed widening of an existing freeway and the change of the building pattern, that they were not wedded to the rails, and either had before, or at the time of the tunnel fire, were using alternate truck

service, and, of course, have used truck service since the tunnel fire.

The Court and Commission found by looking to the past the line sought to be abandoned was making some profit. However, if the tunnel is required to be rebuilt, the cost will exceed the previous two years' net revenue of the whole railroad, and several more times that ratio of the line sought to be abandoned. Thus, if the application to abandon is denied and the tunnel is rebuilt, the result will be a serious deficit situation. The appellant is already in debt to its parent Southern Pacific Company of a sum exceeding $48,000,000. To expend money to rebuild the tunnel will result in a complete absence of available money for any additions and betterments, new cars, locomotives, etc.

The District Court did not correctly apply the tests enumerated in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951), in that it failed to take into consideration the evidence there was little or no industrial or carload future in the area in question, and failed to apply the constitutional fact doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

Likewise, the Commission's application of the entire system's revenues and expenses to the line in question was an improper application of the overall prosperity of the carrier to the burden of the particular line sought to be abandoned (*Southern R. Co. v. North Carolina*, 376 U.S. 93 (1964)).

## CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case

remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

RANDOLPH KARR
670 Pacific Electric Building
610 South Main Street
Los Angeles, California 90014
*Attorney for Appellant*

**CERTIFICATE OF SERVICE**

I, RANDOLPH KARR, attorney for Northwestern Pacific Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of August, 1964, at Washington, D. C., I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with first-class postage prepaid to The Solicitor General, William H. Orrick, Jr., Esq., Assistant Attorney General, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D. C., and with airmail postage prepaid to Cecil F. Poole, Esq., United States Attorney, for the Northern District of California, at Room 422 Post Office Building, San Francisco, California.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Robert S. Burk, Esq., its Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On the Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin

Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., intervening defendants; by mailing copies in a duly addressed envelope, with airmail postage prepaid to their respective attorneys of record:

Graham, James & Rolph,
Boris H. Lakusta, Esq.
E. Myron Bull, Jr., Esq.
310 Sansome Street
San Francisco 4, California

4. On The People of the State of California and The Public Utilities Commission of California, intervening defendants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys of record:

Richard E. Tuttle, Esq.
Hector Amminos, Esq.
State Building
San Francisco, California

and The Atchison, Topeka and Santa Fe Railway Company, intervening defendant, by mailing copy in duly addressed envelope, with airmail postage prepaid, to its attorney of record:

Frederick G. Pfrommer, Esq.
114 Sansome Street
San Francisco, California.

RANDOLPH KARR

## APPENDIX A

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Plaintiff*,

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*,

AND

CITY OF SAN RAFAEL, ET AL., PUBLIC UTILITIES COMMISSION, ET AL., AND ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Intervening Defendants.*

Civ. No. 41639.

United States District Court
N. D. California, S. D.

April 17, 1964.

Action to set aside an order of the Interstate Commerce Commission which denied plantiff's request to abandon a portion of railroad line, wherein several parties intervened. The United States District Court for the Northern District of California, Southern Division, comprised of three judges, Per Curiam, held, inter alia, that substantial evidence supported Commission's findings that there was continuing need for rail service in area affected, that abandonment would adversely affect shipping public, that no long-run losses would be incurred by railroad in its overall system, and that railroad was financially able to restore destroyed tunnel.

Petition denied.

Randolph Karr, Frederick E. Fuhrman, Harold S. Lentz, San Francisco, Cal., for plaintiff Northwestern Pacific R. Co.

William H. Orrick, Jr., Asst. Atty. Gen., John H. D. Wigger Atty., Dept. of Justice, Washington, D. C., Cecil F. Poole, U. S. Atty., San Francisco, Cal., for the United States.

Robert W. Ginnane, Gen. Counsel, H. Neil Garson, Associate Gen. Counsel, Robert S. Burk, Atty., Interstate Commerce Commission, Washington, D. C., for Interstate Commerce Commission.

Graham, James & Rolph, Boris H. Lakusta, E. Myron Bull, Jr., San Francisco, Cal. for intervening defendants Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc.; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc.

Richard E. Tuttle, Hector Anninos, San Francisco, Cal., for intervening defendants The People of the State of California and The Public Utilities Commission of California.

Frederick G. Pfrommer, San Francisco, Cal., for intervening defendant Atchison, Topeka and Santa Fe R. Co.

Before BROWNING, Circuit Judge, and SWEIGERT and ZIRPOLI, District Judges.

PER CURIAM.

This action involves the petition of Northwestern Pacific Railroad to set aside an order of the Interstate Commerce Commission which denied Northwestern's request to abandon 2.465 miles of railroad line in Marin County, California. There are two major issues for consideration. First, plaintiff Northwestern Pacific contends that this Court should exercise its own independent judgment on the law and the facts pursuant to the "constitutional fact" doctrine as announced in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S. Ct. 527, 64 L.Ed. 908 (1920). Second, plaintiff contends that even if the Court refuses to make an independent judgment, the record does not contain substantial evidence to support the findings of the Commission as required by 5 U.S.C. § 1009(e). The Court has con-

cluded that the "constitutional fact" doctrine does not apply to this case, and that, viewing the record as a whole, the findings of the Commission are supported by substantial evidence.

Plaintiff's railroad system extends from a point near the Oregon border along the coastal area of northern California to San Francisco Bay. From the north, the line runs south to Ignacio, a town in northern Marin County, approximately twenty-five miles north of San Francisco. At Ignacio the line splits, so that cars may be routed from Ignacio to Schellville, a town on the northern edge of San Francisco Bay, where plaintiff has a hookup with the Southern Pacific system. The other branch of the line runs south from Ignacio, through the Puerto Suello Tunnel to Tiburon, a point directly across the Bay and north of the City of San Francisco. At Tiburon the Atchison, Topeka and Santa Fe Railway ferries the cars by barge to either Richmond in the East Bay area or to San Francisco. It should be noted that the portion of Marin County south of the tunnel, which is the area that is the subject matter of this lawsuit, is primarily a residential suburb of San Francisco, consisting of many small towns and villages. On July 20, 1961 two juveniles set fire to the Puerto Suello Tunnel, and as far as can be determined, the entire tunnel was destroyed by cave-ins. The tunnel was the only rail route to southern Marin County, except for the Santa Fe barge system. Since the fire, rail service to and from this area has been exclusively by means of the Santa Fe Ferry and has been reduced from daily to twice a week service.

On August 21, 1961 Northwestern Pacific filed an application with the Interstate Commerce Commission for the grant of a certificate of public convenience and necessity under § 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), authorizing abandonment of two and one half miles of track in Marin County north of San Rafael. This section of track is primarily the Puerto Suello Tunnel. It should be noted that petitioner is not asking that it be per-

mitted to abandoned the entire operation in Marin County, but only the means of access to southern Marin from the northern portion of its line. Protests to the application were filed by several cities, industries, and development groups in the area affected, seven railway labor organizations, the Atchison, Topeka and Santa Fe Railway, and the State and Public Utilities Commission of California. On September 17, 1962 the hearing examiner filed his report and concluded in part as follows:

> "Upon consummation of the proposed abandonment, rail transportation service between NWP points south of the tunnel, on the one hand, and, on the other, *interstate* and intrastate points on the lines of other railroads would be confined to routes via Tiburon. Rail service between NWP points north of the tunnel and points on the lines of other railroads would be confined to the one route via Schellville. Local service between NWP points would be divided into two segments, one north of the tunnel and the other south thereof. With restoration of the tunnel, there will continue to be available as to all NWP points the through routes via both Schellville and Tiburon and the breaking of applicant's main line at the tunnel will be avoided. NWP apparently is able, financially and otherwise, to restore the tunnel and upon basis of its own revenue and expense figures will realize net revenues from continued operation through the tunnel that will justify reconstruction of the tunnel and the resumption of service through it. Clearly, no burden upon *interstate* commerce will result from reopening of the tunnel when the matter is considered from the standpoint of NWP as an individual corporate entity. The through route maintained by NWP and Santa Fe via Tiburon reflects a material and valuable contribution to the *interstate* and intrastate transportation system in the area. It is demonstrated that such system is capable of affording daily service by railroad at NWP main line points when both of the major roads connecting with NWP have opportunity to compete for the involved traffic. The collapse of the tunnel already has forced service curtailments at points south of the tunnel with a re-

sumption of daily service apparently dependent upon whether the traffic flow which formerly obtained via Tiburon can be reactivated. Failure in this respect, aside from inability to restore daily service, also renders possible further deterioration in service. As argued by certain protestants, accomplishment of the proposal would leave south of the tunnel site an uneconomic 'island' system with limited, roundabout and unsatisfactory access by water only, which most assuredly would be expected to deteriorate further, both physically and in financial results until it becomes itself a burden upon *interstate* commerce and a legitimate candidate for abandonment. The beneficiary of the abandonment apparently would be applicant's stockholder and connecting carrier, Southern Pacific Company, who would realize as its principal benefit the liquidation or diminution of carrier competition. It further appears that the increase in gross revenues likely to accrue to Southern Pacific Company as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in revenues by NWP and the estimated loss in revenues by Santa Fe, the effects being that the carriers serving the area would not as a group realize any net gain and the shipping public would be left with fewer facilities for rail transportation and materially less efficient and less frequent service." (Italics supplied)

Following the examiner's report, the plaintiff petitioned the Commission for a review of the examiner's findings. On May 22, 1963 the Commission (Division 3) entered its report sustaining the examiner's findings and order. Plaintiff's petition for a finding that an issue of general transportation importance was involved requiring consideration by the entire Commission was denied by order of July 5, 1963. 320 I.C.C. 19.

Plaintiff filed its complaint to set aside the order of the Commission in this Court on July 19, 1963. The motions of the State of California, the Public Utilities Commission of California, the Santa Fe Railway, and several civic and industrial groups in Marin County to intervene as defendants

were granted. On October 25, 1963 the Chief Judge of the Ninth Circuit ordered that a three judge district court be convened to hear plaintiff's petition, pursuant to the provision of § 2284, Title 28 United States Code.

Plaintiff's first contention that this Court must make an independent judgment on the facts is predicated on its contention that the Commission's order unduly burdens interstate commerce and is unconstitutionally confiscatory. Three cases have imposed a constitutional requirement on the law and facts where it is claimed that administrative action is in violation of constitutional rights. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920); Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932); Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922). Although there is some doubt as to whether the constitutional fact doctrine has any validity today, see Davis, Administrative Law Treatise, § 29.00, the Court concludes that even if it does have validity, the present record does not merit its utilization.

[1, 2] In rate review cases, it is clear that agency action is not unconstitutional unless it results in a confiscation of property without just compensation. A rate is confiscatory only if it results in an over-all loss of net profits to the petitioning railroad; that is, the Commission may adopt a rate schedule which renders the particular service unprofitable to the railroad, but as long as there is not a net loss to the entire system, there is no confiscation. In regard to confiscation, the Supreme Court held in B. & O. R. Co. v. United States, 345 U.S. 146, at 148, 73 S.Ct. 592 at 593, 97 L.Ed. 912 that:

> "So long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being taken for a public use 'without just compensation.' And apparently the railroads rely not on the just compensation but on the Due Process provision of the Fifth Amendment."

Although we have not found a single case in which the Supreme Court has held that the confiscation standard of constitutional agency action applies to abandonment as well as rate cases, the Court in the recent case of Southern R. Co. v. North Carolina (United States v. North Carolina), 84 S.Ct. 564, 571, had occasion to review the standards to be applied by the Commission an abandonment cases. The Court said:

> "This Court has long recognized that the Commission may properly give varying weights to the overall prosperity of the carrier in differing situations. Thus, in Colorado v. United States, 271 U.S. 153 [46 S.Ct. 452, 70 L.Ed. 878], which also involved a situation in which the Commission was required to balance public convenience and necessity against undue burdens on interstate commerce, it was specifically noted that 'In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation.' In many cases * * * the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier.' 271 U.S., at 168-169 [46 S.Ct. at 456, 70 L. Ed. 878]. *In cases falling within the latter category, such as those involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services.* But where, as here, the Commission's findings make clear that the demands of public convenience and necessity are slight and that the situation is, therefore, one falling within the first category delineated in Colorado, it is equally proper for the Commission, in determining the existence of the burden on interstate commerce, to give little weight to the factor of the carrier's overall prosperity." (Italics supplied)

[3] From the above languages we have no reason to think that the Supreme Court would not adopt the same standard of confiscation for abandonment cases that it has adopted for rate cases. Consequently, we hold that no confiscation results from an order of the Interstate Commerce Commission denying the abandonment of rail services which are shown to be unprofitable, as long as there is no net loss to the over-all system.

Turning to the evidence on this point, we find that there is no evidence that the order requiring reconstruction of the tunnel would result in a net loss to Northwestern Pacific. The plaintiff indicates that it is a wholly owned subsidiary of the Southern Pacific Company. We find that it is unnecessary to consider whether plaintiff should be treated as part of the Southern Pacific Company or as an independent entity for the purpose of determining whether a net loss amounting to a confiscation resulted from the order in question because there is no confiscation under either theory. The evidence clearly establishes that no net loss would result if we consider the effect of the reconstruction of the tunnel on the entire Southern Pacific system. The evidence further supports the findings of the examiner that plaintiff, if considered as a separate entity, on the basis of its own revenue and expense figures, will realize net revenues from continued operation through the tunnel. Since the question is actually one of degree of profits as opposed to over-all net loss, the only remaining issue is whether there is substantial evidence in the record to support the findings of the examiner.

In arguing that the findings of the Commission are not supported by substantial evidence, plaintiff accuses the Commission of a "gross misunderstanding of what the case is about." This accusation is predicated upon that portion of the decision of Division 3, (320 I.C.C. 19; page 22 which reads as follows:

> "The original route via the tunnel is 17 miles from Ignacio to Tiburon and approximately 6 miles via

ferry to Richmond or a total of 23 miles. The proposed alternate route, over which traffic north of the tunnel is presently moving, via Ignacio, Schellville, and Fairfield to Richmond, is 79 miles and thus approximately 240 percent more circuitous than the route via the tunnel and ferry. This alternate route has always been available to shippers on applicant's line. *However, out of 15,095 carload shipments handled by applicant in 1959 between main line points south of the tunnel (including San Francisco) on the one hand, and main line and branch points north of the tunnel on the other, some 10,024 carloads were interchanged at Tiburon.* In 1960 7,948 out of 12,124 cars used the Tiburon gateway and for the first 5 months of 1961, 3,324 out of 5,117 cars used that point of interchange. Obviously, the cars routed via the Tiburon gateway would not have moved over that route unless it was the most efficient route for those particular cars. The substantial number of cars that utilized the Tiburon gateway in the 2 years and 5 months prior to the fire and the circuity of the *alternate route to the San Francisco area* convinces us that the traffic involved cannot be handled as efficiently via the alternate route as by way of the Tiburon gateway." (Emphasis supplied by plaintiff)

Plaintiff contends that the above quoted language of the Commission clearly shows that it misconceived the nature of the traffic involved and did not appreciate that most of the 10,024 cars interchanged at Tiburon moved to or from destination *outside* the area described by the Commission. We do not so interpret the language of the Commission and are satisfied that it understood the nature of the traffic involved. The Commission understood that 10,024 cars were *interchanged* at Tiburon, and that these cars did not necessarily involve movements only to or within the San Francisco area. We find no confusion in the statement of the Commission which would justify a remand.

The Commission itself at one point speaks of traffic between points on the northern segment and the San Francisco terminal area and *beyond*, thereby indicating it has no limited understanding of the nature of the traffic in-

volved. Furthermore, it adopted as its own the examiner's findings of fact and ultimate conclusions, which findings set forth the *interstate* character of the traffic involved and also specifically state "With the handling by Southern Pacific via Schellville of all traffic from and to NWP points north of the tunnel, the shippers would be able to route traffic in the line-haul service of Santa Fe beyond Stockton, Fresno or Bakersfield, Calif." These three cities are clearly beyond the San Francisco Bay area.

[4, 5] Bearing in mind the tests enunciated in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), we have concluded from a full review of the entire record that the Commission's order must stand. The record is lengthy, and it would serve no useful purpose to outline the testimony of numerous witnesses and the data contained in several exhibits or to point out the various conflicts therein. We merely state that there is substantial evidence to support the examiner's findings that there is a continuing need for rail service in the area affected: that abandonment would adversely affect the shipping public; that no long-run losses would be incurred by plaintiff in its over-all system; and that plaintiff is financially able to restore the tunnel. Under these circumstances, the weight to be given to the evidence and the various factors comprising the public convenience and necessity are for the Commission. Southern R. Co. v. North Carolina (United States v. North Carolina), 84 S.Ct. 564 (1963).

The petition to enjoin, annul and set aside the order of the Commission is denied, and the complaint is dismissed.

## APPENDIX B

## INTERSTATE COMMERCE COMMISSION

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FINANCE DOCKET NO. 21725

NORTHWESTERN PACIFIC RAILROAD COMPANY ABANDONMENT BETWEEN SAN RAFAEL AND FORBES OVERHEAD (PUERTO SUELLO TUNNEL), MARIN COUNTY, CALIF.

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*Decided May 22, 1963*

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Public convenience and necessity found not shown to permit abandonment by Northwestern Pacific Railroad Company of a portion of its main line of railroad in and north of San Rafael, Marin County, Calif. Application denied.

*Randolph Karr* and *Harold S. Lentz* for applicant.

*William M. Bennett: Hector Anninos, Donald B. Day, Boris H. Lakusta, E. Myron Bull, Frederick G. Pfrommer, William V. Ellis, E. A. McMillan, Leonard M. Wickliffe, Charles R. McGowan, James J. Corcoran, J. G. Black, Wallace L. Kaapke, Noel Dyer, Malcolm Barrett, Marvin J. Colangelo, Robert M. Ivie, E. Warren McGuire, J. E. Howe,* and *Warren P. Marsden* for protestants and interested parties.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY, AND TUCKER

TUCKER, *Commissioner:*

Exceptions were filed by applicant to the report and recommended order of the hearing examiner recommending denial of the application, and replies to said exceptions were filed by the California Public Utilities Commission, The Atchison, Topeka and Santa Fe Railway Company

(Santa Fe), and certain affected communities and shippers, all protestants. The case has been argued orally.

By application filed August 21, 1961, the Northwestern Pacific Railroad Company requests authority to abandon that portion of its main line between milepost 17.068 at San Rafael and milepost 19.533, near Forbes Overhead, approximately 2.465 miles, in Marin County, Calif. A hearing was held at which the application was opposed by the State and Public Utilities Commission of California, Cities of San Rafael, San Anselmo, Fairfax, and Sausalito, Calif., County of Marin, Marin Industrial Development Foundation, 11 shippers, the Santa Fe, and 7 railway labor organizations. Appearances as interested parties were entered on behalf of Bay Area Rapid Transit District, Garcia Traffic Service, United Vintners, Inc., County Council of Marin County, and the California Department of Public Works. Briefs were filed and a report and recommended order of the hearing examiner were served. We are in accord with the examiner's findings of fact and ultimate conclusions thereon, which we adopt as our own and will not restate except to the extent necessary for clarity or amplification. However, we believe that our views should be set forth in certain respects.

The portion of line which applicant seeks to abandon forms an intermediate segment of its main line extending from Eureka, Calif., southward via Ignacio and Detour to Tiburon, Calif., a distance of approximately 276 miles. A branch line extends from a connection at Detour to Sausalito. Both the latter point and Tiburon are located on the northern shoreline of San Francisco Bay and at Tiburon applicant connects with the car ferry of the Santa Fe for the movement of freight to the San Francisco terminal area. Approximately 1,357.6 feet of the involved segment are located in the Puerto Suello Tunnel which was destroyed by fire on July 20, 1961, resulting in the original line becoming two disconnected segments, the portion north of the tunnel constituting approximately 97 percent thereof. No passenger service has been rendered over the line since

November 12, 1958. Freight operations of applicant both prior and subsequent to the tunnel destruction have been detailed in the examiner's report. It is sufficient to state that applicant has continued operations over each of the separated segments. Traffic between points on the northern segment and the San Francisco terminal area and beyond has been rerouted over applicant's Ignacio-Schellville branch. At Schellville interchange is made with applicant's parent, the Southern Pacific Company (Southern Pacific), which can handle the traffic into the San Francisco area. Traffic between points on the southern segment and the San Francisco terminal area continued to be handled via the car ferry. The elimination of traffic from the north, however, has decreased movements over the southern segment to the extent that service thereon has been curtailed to twice weekly and the car ferry service has been correspondingly reduced. Rebuilding the tunnel would involve an estimated minimum expenditure of $851,655 if reinforced concrete is used.[1]

The examiner found that had the tunnel been closed in 1959, 1960, and the first 5 months of 1961, and had applicant conducted its operations during those periods as at the present time with the Southern Pacific's participation, the Southern Pacific System would have derived gains in net income therefrom in the amounts of $58,265, $33,722, and $21,476. He is of the opinion, however, that the only beneficiary of the abandonment would be the Southern Pacific through such increased profits and through the liquidation or diminution of carrier competition by the Santa Fe. He pointed out (1) that applicant had net railway operating incomes for the past 5 years and the first 5 months of 1961 of $649,374, $532,441, $712,505, $1,272,231, and $261,287, respectively; (2) that applicant is apparently able financially and otherwise to restore the tunnel, and upon the basis of its own revenue and expense figures will realize net revenues

[1] Applicant collected $200,720 in insurance because of the tunnel fire on a "$500,000 deductible" policy.

from continued operation through the tunnel that will justify its reconstruction; and (3) that past operations have demonstrated the through route maintained by applicant and Santa Fe via Tiburon is capable of affording shippers on the line with daily service. On the other hand, should the abandonment be authorized, shippers on the northern segment would be confined to the one route via Schellville and would be deprived of local service to points on the southern segment. Shippers on the latter segment would be deprived of local service to points north of the tunnel, of the additional interchange point of Schellville, and of a daily service.

In its exceptions and on oral argument applicant primarily argues (1) that the transition of the territory south of the tunnel from an agricultural and industrial area to a residential area and the reduction in rail traffic does not justify the expenditure necessary to reopen and reconstruct the tunnel; (2) that the major portion of the service formerly rendered on the original line continues to be rendered adequately, expeditiously, and with more profit to the system without the use of the tunnel; (3) that it should not be required to make the necessary reconstruction expenditures simply to allow the Santa Fe's continued participation in the through traffic, and (4) that reactivation of the tunnel will create an additional expenditure of an estimated $500,000 to the State when expanding the existing parallel freeway. It is applicant's view that reconstruction of the tunnel under the circumstances, would require an uneconomic and wasteful expenditure of funds.

To support its view applicant has cited *Southern Pac. Co. Abandonment*, 267 I.C.C. 278, and Finance Docket No. 20425, *Missouri Pac. R. Co. Abandonment* (not printed), decided April 22, 1959. The circumstances in the cited cases are not dissimilar to those involved in *Confluence & O. R. Co. Abandonment*, 247 I.C.C. 399, decided July 31, 1941, wherein the Commission, on reargument, permitted abandonment of a line approximately 20 miles in length between Confluence-Oakland Junction, Pa., and Kendall, Md. It served no large

industries except a coal mine which furnished sufficient traffic to support rail transportation facilities. Abandonment of the line was permitted for the sole reason that a large part of the branch would be inundated as the result of a Government flood-control project, thus depriving the coal mine of a rail outlet. The coal mine was found to be of minor importance compared with the benefits that would accrue to the public from the operation of the reservoir and considering that it would cost between $2 million and $2.5 million to relocate the line to serve the coal mine, having an estimated value of about $300,000, the Commission concluded, in effect, that relocation of the line was not justified and would be an economic waste. This decision was affirmed in *Purcell* v. *United States*, 315 U.S. 381.

The instant proceeding differs in that no superior benefits are to be derived by the public through abandonment of the segment in question. While there is some evidence that abandonment might result in a savings to the State when expanding the parallel freeway, no definite plan or schedule for such expansion has been adopted by highway authorities and no specific changes in the highway system in the area are contemplated within the next 5 to 10 years.

Applicant also cites the decision in *St. Louis S. W. Ry. Co. of Texas Abandonment*, 290 I.C.C. 53, where the line to be abandoned was a branch line handling a substantial amount of bridge traffic which could be handled over an alternate route. Rehabilitation expenses were shown to be $881,000, and the net gain to the St. Louis Southwestern system would be $147,000 annually, should the line be abandoned. In authorizing the abandonment, it was pointed out that little use had been made of the line at the local stations thereon; that the bridge traffic could be handled just as efficiently and more economically over an alternate route; that no substantial immediate injury would be occasioned to shippers; that intermediate stations on the branch did not furnish sufficient traffic to permit profitable operation of the line; and that the system revenues therefrom were hardly more than past expenditures for maintenance of the line.

The facts in the instant proceeding are distinguished from those set forth in the above case. The segment herein proposed to be abandoned is a portion of the applicant's main line. Shippers located thereon, south of the tunnel, since its collapse have had their daily rail service decreased. Their all-rail route to and from northern and eastern points is cut off, and they are faced with the necessity of utilizing truck transportation which, as to certain commodities, involve higher costs with less satisfactory handling of traffic. Shippers located north of the tunnel, although not opposing the abandonment, will be deprived of rail service to points on the line south of the tunnel and of the more direct and faster route to Richmond. These adverse effects preclude us from finding that no substantial immediate injury will be occasioned to shippers by the abandonment.

The original route via the tunnel is 17 miles from Ignacio to Tiburon and approximately 6 miles via ferry to Richmond or a total of 23 miles. The proposed alternate route, over which traffic north of the tunnel is presently moving, via Ignacio, Schellville, and Fairfield to Richmond, is 79 miles and thus approximately 240 percent more circuitous than the route via the tunnel and ferry. This alternate route has always been available to shippers on applicant's line. However, out of 15,095 carload shipments handled by applicant in 1959 between main line points south of the tunnel (including San Francisco) on the one hand, and main line and branch points north of the tunnel on the other, some 10,024 carloads were interchanged at Tiburon. In 1960, 7,948 out of 12,124 cars used the Tiburon gateway and for the first 5 months of 1961, 3,324 out of 5,117 cars used that point of interchange. Obviously, the cars routed via the Tiburon gateway would not have moved over that route unless it was the most efficient route for those particular cars. The substantial number of cars that utilized the Tiburon gateway in the 2 years and 5 months prior to the fire and the circuity of the alternate route to the San Francisco area convinces us that the traffic involved cannot be handled as

efficiently via the alternate route as by way of the Tiburon gateway.

The Supreme Court in *Colorado* v. *United States*, 271 U.S. 153, said:

> The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. • • • The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. [Page 168]

We have here a main line of railroad which, prior to its broken continuity was conceded to be profitably operated and there is no evidence of record to indicate that the line cannot continue to be operated at a profit should continuity be reestablished. During 1959, 1960, and the first 5 months of 1961, the applicant derived net railway operating incomes from operation of the line of $1,272,231, $272,269, and $261,287, respectively. The net operating income received for the first 5 months of 1961, if projected over a period of the entire year would be approximately $627,084 or an increase in net railway operating income over 1960 of approximately $354,815. This fact certainly is an indication that the need for transportation in the area is not undergoing an immediate decline. On the other hand, computations disclose that had the same facts existed during those three periods as at the present time and the alternate route utilized, the applicant would have suffered decreases in its net revenues for those periods of $156,819, $101,656, and $38,478.

We have held in a similar case involving this same applicant that costs for reconstruction of a tunnel or at least a major portion thereof can be treated as capital expenditures and therefore amortized over a reasonable period. See *Northwestern Pacific R. Co. Abandonment*, 312 I.C.C. 783.

Under the circumstances described, if the applicant were an independent carrier it would not be difficult to justify a denial. As stated, however, it is a member of the Southern Pacific System and as such, consideration must be given to the argument that while the applicant's revenue position in 1959, 1960, and the first 5 months of 1961 would have been adversely affected had the tunnel been closed, the combined revenues of the applicant and its parent would have been improved to such a degree that the system would have derived incomes exceeding the revenue decreases of the applicant. Although, as previously stated, the Southern Pacific System's income, as a result of the abandonment would be increased by $58,265, $33,722, and $21,476 for the described periods, the applicant in many instances will receive a lower division of the joint rate established via the alternate route than it enjoyed when interchanging with the Santa Fe at Tiburon. Thus a portion of the increased revenues to be enjoyed by the Southern Pacific is derived at the expense of another member of its system. It is quite apparent also that the major portion of the increased revenues will be derived from the substitution of the Southern Pacific's participation in the traffic for that of the Santa Fe.

We agree with the hearing examiner's conclusion that the Southern Pacific's anticipated increase in gross revenues as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in applicant's revenues and the loss of estimated revenues by the Santa Fe, as set forth in the recommended report, the net effect being that the three rail carriers as a group would not realize a net gain therefrom and the shipping public would derive fewer benefits.

Upon consideration of all the evidence of record we are not convinced that the benefits to the applicant and the Southern Pacific from the proposed abandonment through increased system revenues and avoidance of capital expenditures would outweigh the adverse effects which will be suffered by the shipping public should the application be granted. From a review of applicant's past operations and the financial results therefrom, it can reasonably be predict-

ed that a marginal operation will not result from restoration of the tunnel and through service. We conclude, from the record before us, that the area has in the past and will in the foreseeable future generate sufficient traffic and revenues to support the restoration program and the continued through service. Reconstruction of the tunnel will not result in an undue burden upon interstate commerce or upon applicant. When the question to be resolved is a matter of only the degree of profits by the railroads on the one hand as against a loss by the shipping public through fewer facilities for rail transportation and a less efficient, slower service, it must be resolved in favor of the public. The application is denied.

An appropriate order will be entered.

## ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 22nd day of May A.D. 1963.

Finance Docket No. 21725

NORTHWESTERN PACIFIC RAILROAD COMPANY
ABANDONMENT BETWEEN SAN RAFAEL AND FORBES OVERHEAD (PUERTO SUELLO TUNNEL), MARIN COUNTY, CALIF.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said Division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner, are hereby referred to and made a part hereof:

*It is ordered*, That the application of the Northwestern Pacific Railroad Company to abandon that portion of its main line in Marin County, Calif., described in the reports aforesaid, be, and it is hereby, denied.

By the Commission, Division 3.

(SEAL)

HAROLD D. McCOY,
*Secretary.*

**APPENDIX C**

# INTERSTATE COMMERCE COMMISSION

Served September 17, 1962

FINANCE DOCKET No. 21725

NORTHWESTERN PACIFIC RAILROAD COMPANY—ABANDONMENT BETWEEN SAN RAFAEL AND FORBES OVERHEAD (PUERTO SUELLO TUNNEL), MARIN COUNTY, CALIF.

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Decided.....

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Public convenience and necessity found not shown to permit abandonment by Northwestern Pacific Railroad Company applicant of portion of its main line of railroad in and north of San Rafael, Marin County, Calif. Application denied.

*Randolph Karr* and *Harold S. Lentz* for applicant.

*William M. Bennett, Hector Anninos, Donald B. Day, Boris H. Lakusta, E. Myron Bull, Frederick G. Pfrommer, William V. Ellis, E. A. McMillan, Leonard M. Wickliffe, Charles R. McGowan, James J. Corcoran, J. G. Black,* and *J. E. Howe* for protestants.

*Wallace L. Kaapke, Noel Dyer, Malcolm Barrett, Marvin J. Colangelo, Robert M. Iric, E. Warren McGuire,* and *Warren P. Marsden* for interested parties.

## REPORT AND ORDER

Recommended by F. Roy Linn, Hearing Examiner

By application filed August 21, 1961, Northwestern Pacific Railroad Company seeks a certificate that the present or future public convenience and necessity permit abandonment of the portion of its main line between Milepost 17.068 at San Rafael and Milepost 19.533, near Forbes Overhead, in Marin County, Calif. Protests were filed and

the application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held at San Francisco, Calif., January 25, March 22, 23, 29, and 30, and June 4 to 8, 1962, since which time the parties have filed briefs. The application is opposed by the State and Public Utilities Commission of California, Cities of San Rafael, San Anselmo, Fairfax, and Sausalito, Calif., County of Marin, Marin Industrial Development Foundation, eleven shippers, The Atchison, Topeka & Santa Fe Railway Company, and seven railway labor organizations. Appearances as interested parties were entered on behalf of Bay Area Rapid Transit District, Garcia Traffic Service, United Vintners, Inc., County Council of Marin County, and the California Department of Public Works.

The portion of the line proposed to be abandoned by applicant, hereinafter sometimes called NWP, extends from a point within the corporate limits of San Rafael to Forbes Overhead, a distance of 2.465 miles. The request for authority to abandon the described mileage was occasioned by major damage by fire to and partial collapse of applicant's Tunnel No. 4, known as Puerto Suello Tunnel, which except for its northern portal is located within the corporate limits of San Rafael, population 20,460. As applicant's line in the involved area is built in a pass through a series of hills, relocation is not feasible and, if service is to be resumed, the restoration of the tunnel will be necessary.

On brief, applicant urges that neither present nor future public convenience and necessity require continuance of the rail mileage in question, arguing among other things that rail business in the area has been decreasing and can be expected to decline in the future; that rail service will continue to exist in the area even though the involved mileage is abandoned; and that the expense of rebuilding the tunnel is not justified. Protestants contend in part that NWP will be financially better off by restoring the tunnel and operating through it; that the shipping public now needs, and in the future in even greater degree will need

the direct, daily rail service which existed before the tunnel collapse; that, although it ostensibly seeks only to avoid certain expense in connection with rebuilding of the tunnel, the necessary effect of the application is to cancel many through routes of long standing having substantial use and to divert traffic from protestant Santa Fe to applicant's parent, Southern Pacific Company; and that applicant has not sustained its burden of proving that public convenience and necessity permit the proposed abandonment.

Applicant operates lines of railroad between Tiburon and Sausalito, Calif., located on the nothern shoreline of San Francisco Bay, on the one hand, and, on the other, Eureka and Areata, Calif. Its main line generally parallels the Pacific Coast from Tiburon via Detour, San Rafael, Ignacio, and various other intermediate points to Eureka, 276 miles. The distances from Tiburon to Detour, San Rafael, and Ignacio are 6, 9, and 17 miles, respectively. Branch lines are operated from Detour to Sausalito, 7 miles, and from Ignacio to Schellville, 45 miles, connection being made at Schellville with the rail lines of Southern Pacific Company. Interchange of traffic is effected at Tiburon with protestant Santa Fe, which operates a car-ferry service across San Francisco Bay between Tiburon and Richmond, the latter being one of the San Francisco Bay termini of protestant's rail lines. Applicant treats San Francisco as one of its main line points and interchanges traffic thereat with Southern Pacific Company. The physical transfer across San Francisco Bay between Tiburon and San Francisco is accomplished in the car-ferry equipment operated by protestant Santa Fe on a contractual arrangement other than participation in joint rates. Applicant's capital stock is owned by Southern Pacific Company. See *Control of Northwestern P. R. Co.*, 150 I.C.C. 119.

Puerto Suello Tunnel is 1357.6 feet in length and as of the time of the fire July 29, 1961, was lined with and supported by redwood timbers, except for concrete construction of

91.6 feet at the southern portal and 18.2 feet at the northern portal.[1] About 3:30 o'clock P.M. on the date mentioned, two NWP bridge and building employees traveling by motor car entered the tunnel and midway thereof discovered fires between the rails and along and behind the walls of the tunnel. Although city and county fire departments were called, the fires could not be extinguished and continued to burn over a period of several hours, causing the death of one fireman. The fires are said to have been started by two minors who were found within the tunnel by the two NWP employees.

In the early course of the fire, the air draft from north to south generated by the 1.19 percent grade of the tunnel caused a rapid burning of the timbers in the southern half of the tunnel. When a cavein occurred near the southern portal, the fire spread toward the northern portal, burning areas having been observed within 75 to 100 feet of such portal. Due to the caveins at both portals, no one has been able to inspect the interior of the tunnel. Upon all the evidence, however, there appears to be little doubt that timbers, particularly the overhead timbers, throughout most of the tunnel were destroyed or damaged and that with the resulting loss of support varying amounts of dirt and rock throughout the length of the tunnel bore may have dropped into the bore. As stated above, the tunnel is completely blocked at both portals. It also appears that temperatures generated by the fire may have caused twisting and warping of individual rail sections within the tunnel creating a hindrance to reconstruction or repair operations.

Both applicant and certain protestants conducted studies with a view to arriving at the costs which would be incurred in reconstructing the tunnel. Applicant expresses the opin-

[1] The profile of the ground line above the tunnel ascends gradually from approximately 15 feet above the southern portal to about 71 feet above top of rail at a point 540 feet from the southern portal. Beyond such point, Puerto Suello Hill sharply rises to peak, some 220 feet above rail, before sloping downward for the remaining 400 feet, horizontal distance, to the northern portal.

ion that the most economical plan of restoration is retimbering but it argues that a timber-lined tunnel is unsatisfactory because of the fire hazard and the difficulty of obtaining timbers such as were used in the original and subsequent construction of the tunnel. It takes the position that, if reconstruction is undertaken, a reinforced concrete lined tunnel should be built. Its plan of reconstruction would be divided into three separate steps, one step to consist of the rebuilding of the 449 foot collapsed section of the tunnel near the south portal by cut and cover methods, another to include the redriving of the 162 foot collapsed section at the northern portal, and the third to embrace the removal of earth and debris and installation of reinforced concrete lining in the remaining 636.8 foot portion of the tunnel. Applicant estimates that cost aggregating $851,665 will be incurred in reopening and reconstructing the tunnel in the manner described. It obtained a bid in writing by one contractor of $1,212,625 and an oral bid by another of $906,540 for reconstruction of the tunnel, but indicates that the bids, as such, were not firm offers as both contractors explained that the work would have to be done on a cost-plus basis due to the unknown factors involved. Although not introduced in evidence, the witness for applicant also had prepared estimates indicating that cost of $763,000 would be incurred in reconstruction of the tunnel using redwood timbers in lieu of reinforced concrete and employing the operating methods above outlined. Protestants' estimates do not differ with those of applicant in such degree as to require specific discussion thereof.

Prior to the tunnel fire, freight service six days a week was maintained by NWP for traffic moving between main line points south of the tunnel, on the one hand, and, on the other, points north thereof, and for traffic moving from and to both Tiburon and Schellville. Using a tug and float accommodating about 13 rail cars, protestant Santa Fe operated a car ferry service six days a week between Tiburon, on the one hand, and, on the other, connections with its rail

lines at Richmond. Freight service at points on applicant's Sausalito branch was provided three days a week. All passenger service over applicant's lines was discontinued in 1958.

Since the fire, rail freight service between points south of the tunnel, on the one hand, and, on the other, points north thereof, including Schellville, has been discontinued. Rail service between points south of the tunnel is now operated only Tuesdays and Fridays. The car ferry service of protestant Santa Fe has been reduced to operation two days a week, Mondays and Thursdays, arriving at Tiburon about 11 o'clock A.M. on each of such days. Interstate traffic moving to or from NWP points north of the tunnel is interchanged by NWP and SP at Schellville, the routing via Santa Fe to and from Tiburon not now being available for such traffic.

Freight traffic handled by NWP between main line points south of the Puerto Suello Tunnel, including San Francisco, on the one hand, and, one the other, main line and branch points north of the tunnel, consisted in 1959 of 15,095 carload shipments and 3,085 tons of less-than-carload shipments producing revenues of $1,848,249; in 1960 of 12,124 carload shipments and 2,406 tons of less-than-carload shipments, producing $1,565,106; and in the first 5 months of 1961, of 5,117 carload shipments and 604 tons of less-than-carload shipments with revenues therefrom of $678,178.[2] The less-than-carload traffic was handled in substituted truck service and small percentages of the carload traffic, 77 carloads in the first 5 months of 1961, were moved in highway trailers on the highway as part of trailer-on-flatcar movements. The volumes outlined above do not include traffic moving between points on the Sausalito Branch and points north of the tunnel amounting to 291 cars in 1959; 422 cars in 1960; and 149 cars in the first 5 months of 1961.

[2] NWP railway operating revenues from system operations were $13,898,777 in 1959; $11,408,354 in 1960; and $4,339,250 in the first 5 months in 1961.

The traffic above described as having been handled between main line points consisted chiefly of lumber and other products of forests, 5,882 cars in 1959 and 3,473 cars in 1960; pulpwood, chips and logs, 3,709 cars in 1959 and 3,923 cars in 1960; and rock, sand, and gravel, 3,292 cars in 1959 and 2,675 cars in 1960. Other commodities moving in volumes exceeding 100 cars included automobiles, animal and poultry feed, grain and grain products, liquors, wines, and wallboard and plasterboard.

Of the 15,095 carload shipments above shown as having been handled by NWP in 1959, some 10,024 shipments aggregating 418,972 tons of freight were interchanged at Tiburon with protestant Santa Fe, most of which were originated at or destined to points north of Puerto Suello Tunnel. The traffic originated or terminated by NWP at its main line points south of the tunnel in the same year aggregated 4,616 carload shipments, including local shipments and shipments moved to and from interchange at Schellville and Tiburon. Since the tunnel fire, interstate traffic originated at or destined to points north of the tunnel has been interchanged with Southern Pacific at Schellville, and traffic originated at or destined to points south of the tunnel has been interchanged with Southern Pacific at San Francisco or Santa Fe at Tiburon. In the five months ended December 31, 1960, prior to the tunnel fire, 3,392 carload shipments were interchanged at Tiburon, of which 3,107 cars were delivered to Santa Fe and 285 were received. In the five months ended December 31, 1961, NWP delivered 75 cars to Santa Fe at Tiburon and received 41 for a total of 116 car-load shipments. Revenues accruing to Santa Fe on traffic moving via Tiburon declined from $700,155 for the first period to $36,972 in the second.

With abandonment of the tunnel, NWP anticipates permanent loss of certain traffic, principally lumber, rock, sand, and gravel moving locally. The carload traffic which will be lost as a result of abandonment produced revenues of $262,080 in 1959; $208,777 in 1960; and $91,235 in the first

5 months of 1961. In the making of joint rates with Southern Pacific with interchange at Schellville, NWP in certain instances receives divisions somewhat lower than those received from joint rates on traffic interchanged with Santa Fe at Tiburon. If the traffic interchanged with Santa Fe at Tiburon in 1959, 1960, and the first 5 months of 1961, had been interchanged with Southern Pacific at Schellville, the carload freight revenues of NWP in the three periods would have been reduced in the amounts of $169,544, $137,816, and $56,363. The sums of the two foregoing items for each of the three periods, $431,624, $346,593, and $147,598, reflect the decrease in revenues which NWP would have experienced if the tunnel had been closed during 1959, 1960, and the first 5 months of 1961. When such decreases in revenues are offset by the costs which have been incurred in moving the lumber, rock, sand, and gravel expected to be lost, by estimated reductions in expenses to be realized in handling traffic via Schellville, and by the expenses assigned to operation of the portion of line to be abandoned, NWP calculates that its net decreases in revenues if the tunnel had been closed in the described periods would have been $209,930, $154,570, and $60,476. Further offsetting the decreases in revenues by certain railway tax accruals and annual interest of 5 percent on certain capital costs allegedly avoidable by abandonment, it arrives at the somewhat smaller net decreases of $156,819, $101,656[3], and $38,478.

While the revenue position of NWP in 1959, 1960, and the first 5 months of 1961 would have been adversely affected if the tunnel had been closed during such periods and apparently would be similarly affected in the future as a result of the proposed abandonment, it is contended that upon abandonment of the tunnel the combined revenues of NWP and its parent, Southern Pacific Company, will be improved in such degree as to make the abandonment a profitable undertaking for the system. The disruption of the through

[3] In 1960, the last full year of operation prior to the tunnel fire, NWP had total net railway operating income from its entire line of $272,269.

routes via Tiburon and the corresponding necessity for routing via Schellville assures participation by Southern Pacific Company in all traffic moving by railroad to and from points north of the tunnel, and had this condition existed in 1959, 1960, and the first 5 months of 1961, that carrier would have enjoyed increases in revenues of $602,088, $469,570, and $200,823, with estimated net railway operating income of $268,195, $188,282, and $81,952. Such nets would have exceeded the revenue decreases suffered by NWP and would have resulted in increases in system net income for the three periods of $111,376, $86,636, and $43,474, provided the tax accruals and interest mentioned above are taken into account in computing NWP revenue decreases. Computed independently of the tax accruals and interest, the system gains in net income for the three periods would have been $58,265, $33,722, and $21,476. The latter method of calculating the system gains appears to reflect agreement with the findings of the Commission in prior proceedings. Compare Finance Docket No. 20900 *Northwestern Pacific Railroad Company Abandonment (Portion) Bausalito Branch in Marin County, Calif.*, decided January 24, 1962.

With the handling by Southern Pacific via Schellville of all traffic moving from and to NWP points north of the tunnel, the shippers would be able to route traffic in the line-haul service of Santa Fe beyond Stockton, Fresno, or Bakersfield, Calif. Upon basis of figures for 1959 traffic, the disruption of the through route via Tiburon will result in loss to Santa Fe of divisions aggregating $532,544. As the frequency of Santa Fe schedules to and from its rail terminus at Richmond is not dictated alone by the amount of the Tiburon interchange, there would be little saving of rail costs, but it is estimated that reduction in the frequency of car ferry service between Richmond and Tiburon would produce savings of about $20,000 a year. Shippers obtained faster service for certain traffic when the Tiburon route was specified and on that account such route was used even though the rates sometimes were lower via Schellville. In

one test period, July and October, 1960, and January and April, 1961, some 129 out of 716 carload shipments routed via Tiburon could have been routed via Schellville at lower transportation costs.

Applicant argues that the position of protestant Santa Fe is untenable and cites *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I.C.C. 127, wherein the Commission in exercising its jurisdiction under section 15(4) of the act to prescribe through routes found in part that Northwestern Pacific and Southern Pacific must be treated as a single line for rate-making purposes, and that as a single unit they are entitled to their long-haul under section 15(4). The validity of the described finding apparently has not been challenged in the past as indicated by the condition above mentioned in which NWP and Southern Pacific on some occasions have established rates via Schellville lower than the NWP-Santa Fe rates via Tiburon. Insofar as the instant proceeding is concerned, however, it is clear that the issue requiring consideration are those specified in section 1(18 to 21) of the act which as pertinent herein relates to the public convenience and necessity in respect of a proposed abandonment. Although not of controlling importance herein, it may be noticed that the cited decision contains reference to provisions of the act making it the duty of common carriers by railroad to establish through routes and just and reasonable rates applicable thereto, and to provide reasonable facilities for operating through routes, and further refers to the proceeding in which Southern Pacific acquired entire control of NWP wherein there was disclaimed any intention of disturbing any through rates then applying via the Santa Fe or taking any step, as a result of single ownership, which could affect the public adversely.

Applicant undertakes to show that several motor carriers hold authority to conduct operations in the area. There is no competent evidence however, that any of such carriers, with the exception of Pacific Motor Trucking Company, a subsidiary of Southern Pacific Company, in fact has available

facilities and is ready and willing to provide reasonably adequate transportation service for any of the rail traffic in issue. NWP and Pacific Motor Trucking Company have established a joint rate or rates for the transportation of lumber but have not moved any traffic thereunder. The protesting shippers have used motor carrier service to some extent since the closing of the tunnel and have found such service fails to afford certain advantages enjoyed in the use of rail service. The protesting shippers regard the rail service as having been satisfactory prior to closing of the tunnel, but since that time have experienced reduction from daily to twice-weekly service with accompanying fluctuations in transit time, bunching of deliveries, and other inconveniences. They have suffered complete loss of rail service to and from Schellville and other NWP points north of the tunnel necessitating attempts to use truck transportation which as to certain commodities involves higher costs with less satisfactory handling of the traffic.

Claim is made by applicant that the area between San Rafael and Tiburon has little, if any, future industrial potential and that freight traffic has declined in recent years in line with tendency of the area to become residential and commercial. Carload freight traffic originated or terminated by NWP at main line points in the 10-year period from 1951 to 1960, inclusive, amounted to 5,626 cars in 1951; 5,089 in 1952; 5,457 in 1953; 5,860 in 1954; 7,068 in 1955; 8,085 in 1956; 5,917 in 1957; 5,107 in 1958; 4,616 in 1959; and 3,788 in 1960. The volume in 1960 obviously is the lowest for any year of the period, but the traffic handled as late as 1958 did not appreciably differ from the volume for 1952. Protestants introduced studies reflecting a 9.9 percent population increase in Marin County since the 1960 census, a 29.3 percent increase in number of manufacturing establishments in 1960 over 1955, and increases in various other respects, except agricultural production which declined a fraction of one percent. NWP had net railway operating income of $649,374 in 1956; $532,441 in 1957; $712,505 in 1958; $1,272,

231 in 1959; $272,269 in 1960; and $261,287 in the first 5 months of 1961: The net for the 5-month period suggests a possibility of improved conditions along NWP lines, and in conjunction with the studies by protestants tends to support the conclusion that need for transportation service, including rail service, is not undergoing an immediate and catastrophic decline. It also should be kept in mind that the effects of the proposed abandonment will not be confined to the main line points of San Rafael to Tiburon, inclusive.

Question is raised as to whether applicant has understated the losses it would suffer as a result of the proposed abandonment, particularly as to the costs it would incur in making the tunnel safe for abandonment. Estimates for this purpose vary from $25,000 to $300,000 depending upon whether the necessary work will consist of plugging the south portal to prevent subsidence or the filling with gravel or sand of the entire tunnel bore by the process of drilling pour holes from above and compacting the gravel or sand in the bore under pressure. Whether resolved upon basis of the lower or higher estimate, the result would not lend support for the abandonment proposal.

Issues are presented as to the type of construction which should be employed in any restoration of the tunnel and whether the costs of any reconstruction or repair items properly may be treated by NWP as operating expense as distinguished from capital expenditure. The retimbering of the tunnel will afford to applicant a unit of property with a life of many years and any decision to install a more permanent unit is a matter for management. If the entire lining of the tunnel, including portals, is replaced, none of the cost with the possible exception of that for cleanup operations such as the removing of the old timbering would appear to constitute an operating expense. If, upon inspection of the interior of the tunnel, it should be determined that a portion or portions of the tunnel lining do not have to be rebuilt, it may be possible that replacement in kind of burned out sections would be chargeable to operating expense. For the

reasons hereinbefore stated, however, there is reason to believe the tunnel lining was damaged throughout the entire length thereof and the findings accordingly are made with the view that restoration will involve relining of the tunnel bore in its entirety.

Consistently with *Parcell* v. *United States*, 315 U.S. 381, any costs that will be incurred in event abandonment is not permitted by the Commission must be taken into account. There is some evidence tending to show that continued operation by NWP of the involved portion of its line will give rise to additional highway construction costs if and when U.S. Highway 101, which generally parallels the right-of-way, is widened or relocated. There is no indication that highway authorities have ordered or approved any specific changes in the highway system in the area and such changes as ultimately may be made admittedly are five to ten years away. The adoption herein of any definite cost figures in respect to possible future highway construction accordingly is not warranted.

Upon consummation of the proposed abandonment, rail transportation service between NWP points south of the tunnel, on the one hand, and, on the other, interstate and intrastate points on the lines of other railroads would be confined to routes via Tiburon. Rail service between NWP points north of the tunnel and points on the lines of other railroads would be confined to the one route via Schellville. Local service between NWP points would be divided into two segments, one north of the tunnel and the other south thereof. With restoration of the tunnel, there will continue to be available as to all NWP points the through routes via both Schellville and Tiburon and the breaking of applicant's main line at the tunnel will be avoided. NWP apparently is able, financially and otherwise, to restore the tunnel, and upon basis of its own revenue and expense figures will realize net revenues from continued operation through the tunnel that will justify reconstruction of the tunnel and the

resumption of service through it. Clearly, no burden upon interstate commerce will result from reopening of the tunnel when the matter is considered from the standpoint of NWP as an individual corporate entity. The through route maintained by NWP and Santa Fe via Tiburon reflects a material and valuable contribution to the interstate and intrastate transportation system in the area. It is demonstrated that such system is capable of affording daily service by railroad at NWP main line points when both of the major roads connecting with NWP have opportunity to compete for the involved traffic. The collapse of the tunnel already has forced service curtailments at points south of the tunnel with a resumption of daily service apparently dependent upon whether the traffic flow which formerly obtained via Tiburon can be reactivated. Failure in this respect, aside from inability to restore daily service, also renders possible further deterioration in service. As argued by certain protestants, accomplishment of the proposal would leave south of the tunnel site an uneconomic "island" system with limited, roundabout and unsatisfactory access by water only, which most assuredly would be expected to deteriorate further, both physically and in financial results until it becomes itself a burden upon interstate commerce and a legitimate candidate for abandonment. The beneficiary of the abandonment apparently would be applicant's stockholder and connecting carrier, Southern Pacific Company, who would realize as its principal benefit the liquidation or diminution of carrier competition. It further appears that the increase in gross revenues likely to accrue to Southern Pacific Company as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in revenues by NWP and the estimated loss in revenues by Santa Fe, the effects being that the carriers serving the area would not as a group realize any net gain and the shipping public would be left with fewer facilities for rail transportation and materially less efficient and less frequent service.

ULTIMATE FINDINGS AND ORDER

The examiner finds that the present and future public convenience ~~and necessity~~ are not shown to permit abandonment by the Northwestern Pacific Railroad Company of the line of railroad previously described, and that the application should be denied.

Premises considered, it is the order of the examiner that:

The application of Northwestern Pacific Railroad Company for a certificate permitting it to abandon that portion of its main line extending from Milepost 17.068 at San Rafael to Milepost 19.553 near Forbes Overhead, in Marin County, Calif., be, and it is hereby denied, effective on the date of service of a notice or order stating this recommended order has become the order of the Commission.

By the Commission, F. Roy Linn, Hearing Examiner.

Dated at Washington, D. C., this 12th day of September, A.D. 1962.

HAROLD D. McCOY,
Secretary.

(SEAL)

## APPENDIX D

### Interstate Commerce Act
### Section 1 (18) to (21), inclusive

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as

hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as

a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Office-Supreme Court, U.S.
FILED
SEP 12 1964
JOHN F. DAVIS, CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1964

## No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, *et al.*, *Appellees*.

**On Appeal from the United States District Court for the Northern District of California, Southern Division**

## MOTION TO AFFIRM

BORIS H. LAKUSTA
310 Sansome Street
San Francisco 4, California
*Attorney for Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc.; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., Appellees.*

GRAHAM JAMES & ROLPH
E. MYRON BULL, JR.
310 Sansome Street
San Francisco 4, California
*Of Counsel*

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# In the Supreme Court
OF THE
# United States

October Term, 1964

No. 381

Northwestern Pacific Railroad Company, *Appellant*,

vs.

Interstate Commerce Commission and
United States of America,

and

City of San Rafael, *et al.*, *Appellees*.

**On Appeal from the United States District Court for the Northern District of California, Southern Division**

## MOTION TO AFFIRM

Appellees Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc.; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal);

McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

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## STATEMENT

Appellant's *Statement* is substantially correct. However, it should be added that after the decision of Division 3 of the Interstate Commerce Commission denying appellant's application for authority to abandon the line in question (Jurisdictional Statement, Appendix B) appellant filed with the Interstate Commerce Commission a "Petition . . . Seeking a Finding That An Issue of General Transportation Importance is Involved." By its order served July 11, 1963 (Appendix 1 hereof) the Commission held that no issue of general transportation importance was involved in the proceeding, and denied appellant's petition.

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## ARGUMENT

The decision of the District Court denying appellant's petition to enjoin, annul and set aside the order of the Interstate Commerce Commission, and dismissing appellant's complaint, is plainly correct. In railroad abandonment cases, the Interstate Commerce Commission is governed by the following statutory standard (Interstate Commerce Act, Section 1(18), 49 U.S.C. Section 1(18)):

> "... no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Proper application of the public convenience and necessity standard in Section 1(18) involves a balancing of interests by the Commission. The needs of the local shippers and communities, on the one hand, are compared with the burden (if any) which would be imposed upon interstate commerce by continued operation of the railroad line. This test was set forth almost forty years ago in the case of *Colorado v. United States*, 271 U.S. 153, 168-170 (1926), a decision which the Interstate Commerce Commission has followed ever since and which this Court cited and quoted with approval at the last term. See *Southern Railway Company v. North Carolina*, 376 U.S. 93, 84 S.Ct. 564, 571 (1964).

The Interstate Commerce Commission applied the *Colorado* test to the generally uncontroverted facts of the instant case, and denied authority to abandon. The three-judge District Court affirmed.

The case involves the two major issues which are typical of abandonment proceedings: whether the local shippers and communities need continued rail service of the quantity and quality enjoyed before the line was blocked by the tunnel collapse, and whether a burden on interstate commerce will be created by the repair and continued operation of the line. On the first issue, the hearing examiner and the Interstate Commerce Commission found,

in the words of the District Court, that ". . . there is a continuing need for rail service in the area affected [and] that abandonment would adversely affect the shipping public . . ." Applicant, in its *Question Presented* No. 6, attacks the substantiality of the evidence supporting these findings and contends that the District Court misapplied the test for judicial review of decisions of an administrative agency set forth in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

The question of substantial evidence and application of the *Universal Camera* test in an abandonment case presents no substantial issue calling for briefing and argument before the Court. There are no novel or unique issues involved, nor is there any conflict in the decisions of lower courts. Moreover, the decisions of the hearing examiner and of the Interstate Commerce Commission (Appendices B and C to the Jurisdictional Statement) contain a comprehensive summary of the record demonstrating that the Commission's decision was based upon substantial evidence in the record considered as a whole, and making unnecessary any briefing or argument of the issue of the correctness of the Commission's findings on public need for a restoration of former rail service in the area involved.

The findings of the hearing examiner and Commission are based upon the testimony and exhibits of a number of protesting shipper witnesses, whose testimony was accurately summarized by the examiner* as follows:

---

*The Commission adopted the examiner's findings of fact and conclusions of law. Jurisdictional Statement, Appendix B, p. 12a.

"The protesting shippers regard the rail service as having been satisfactory prior to closing of the tunnel, but since that time have experienced reduction from daily to twice-weekly service with accompanying fluctuations in transit time, bunching of deliveries, and other inconveniences. They have suffered complete loss of rail service to and from Schellville and other NWP points north of the tunnel necessitating attempts to use truck transportation which as to certain commodities involves higher costs with less satisfactory handling of the traffic." (Jurisdictional Statement, Appendix C, page 31a).

Against this, appellant contends that the railroad business in the area is declining and that the territory has little or no industrial or carload future. This contention is based on the opinion of an employee of appellant who testified at the hearing. On the other hand, the record contains statistical evidence of the volume of carload freight traffic originated or terminated by appellant in the relevant area for a 10 year period prior to the collapse of the tunnel and also a series of statistical exhibits introduced by protestants indicating increasing commercial and manufacturing activity in Marin County. The Commission resolved the question after consideration of all of this evidence, as indicated in Appendix B to the Jurisdictional Statement, page 16a:

"The segment herein proposed to be abandoned is a portion of the applicant's main line. Shippers located thereon, south of the tunnel, since its collapse have had their daily rail service decreased. Their all-rail route to and from northern and eastern points is cut off, and they are faced with the necessity of utilizing truck transportation which, as to certain

> commodities, involve [sic] higher costs with less satisfactory handling of traffic. Shippers located north of the tunnel, although not opposing the abandonment, will be deprived of rail service to points on the line south of the tunnel and of the more direct and faster route to Richmond. These adverse effects preclude us from finding that no substantial immediate injury will be occasioned to shippers by the abandonment."

Further review of the record by this Court is not indicated, since the examiner's and Commission's decisions set forth the basic facts upon which their ultimate findings were based, together with the evidence upon which appellant would necessarily rely in contending for the opposite result. It is clear from these documents that the findings are supported by substantial evidence, considering the record as a whole, and that the District Court correctly so held.

The Commission also considered the second basic issue—whether the repair and continued operation of the line in question would constitute a burden upon interstate commerce. As the District Court found (Jurisdictional Statement, Appendix A, page 8a) appellant is a wholly owned subsidiary of the Southern Pacific Company. There was, as that Court noted, no evidence that the order denying abandonment would result in a net loss to appellant considered as a separate entity. On the contrary, evidence introduced before the Commission by appellant itself indicated clearly that appellant would *increase* its net profit by over $100,000 per year (appellant's computations, based on 1959-60 traffic levels; see Jurisdictional Statement, Appendix C, page 28a) by

repairing the tunnel. If appellant were considered alone, it is manifest that authority to abandon was properly denied, since the only purpose of Section 1(18) of the Interstate Commerce Act is to protect interstate commerce against burdens arising from financial losses. *Colorado v. United States, supra*, 271 U.S. 153, 163 (1926):

> "The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which is found to result from operating a branch at a large loss."

However, appellant is owned by the Southern Pacific Company, and both the Interstate Commerce Commission and the District Court considered Southern Pacific system revenues as a whole in reaching their decisions. Appellant, by its own computations, demonstrated that the continued blocking of its main line by the collapsed tunnel resulted in increased annual net revenue to the Southern Pacific System considered as a whole (i.e., including both the Southern Pacific Railroad and appellant). Such increase was relatively minor, and was found by the examiner to be $58,265 and $33,722 annually at 1959 and 1960 traffic levels. (Jurisdictional Statement, Appendix C, page 29a). Appellant acknowledged at the hearing that this increase in net system revenue resulted from the diversion of traffic to Southern Pacific from another railroad, The Atchison, Topeka and Santa Fe. The collapsed tunnel blocks off appellant's former connection with the Santa Fe at Tiburon. The Commission

concluded, considering the Southern Pacific system as a whole, that the burden upon the Santa Fe was at least as great as the benefit to the Southern Pacific system, stating its conclusion as follows (Jurisdictional Statement, Appendix B, page 18a):

> "We agree with the hearing examiner's conclusion that the Southern Pacific's anticipated increase in gross revenues as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in applicant's revenues and the loss of estimated revenues by the Santa Fe, as set forth in the recommended report, the net effect being that the three rail carriers as a group would not realize a net gain therefrom and the shipping public would derive fewer benefits."

Appellant attacks the Commission's decision on the ground that appellant's property has been confiscated without due process of law, and that the making of such contention required a review *de novo* by the lower court under the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). This contention forms the second and third of appellant's *Questions Presented*. The lower court held, citing *Southern Railway Co. v. North Carolina*, *supra*, 84 S.Ct. 564, 571 (1964), that the *Ben Avon* doctrine was not applicable in abandonment proceedings. In the passage quoted by the District Court from *Southern Railway*, this Court said:

> "In cases falling within the latter category, such as those involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course

> obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services."

The applicable test is public convenience and necessity. Even if the Commission's order in this case would result in "large deficits," rather than a mere reduction in profits, the Commission's finding that public convenience and necessity do not permit of abandonment would satisfy all statutory and constitutional prerequisites to the denial of the application.

There are only two features of the instant case which set it apart in any way from a routine abandonment proceeding. Appellant has called the Court's attention to one of these features, the fact that the collapse of the tunnel has resulted in a *de facto* abandonment and that some $850,000 must be expended for repairs in order to put the line back into operation. However, the annual cost of amortizing this expenditure was included in the figures submitted by appellant to the Commission, and was considered together with all of the other evidence. While this is a large sum, the record shows that a substantial portion of the net income of appellant was derived from traffic moving via the tunnel route, and that portion of appellant's net income cannot be regained unless the tunnel is repaired. In any event, the fact that substantial repairs are required does not alter the duty of the Commission to balance the interests and determine whether the burden of operation, including the cost of such repairs, is such as to overcome the need of local

shippers and communities for a restoration of prior rail service.

The second unusual feature of the case is that, according to applicant's own figures, and giving full weight to the cost of restoring the tunnel, applicant would be financially better off if it restored the tunnel. Thus the only possible justification for abandonment is the modest increase in net profits accruing to the combined Northwestern Pacific-Southern Pacific system if the tunnel remains closed. Such modest increase is at the expense of substantial reduction of service to the shipping public and arises from diversion of traffic from another railroad, the Santa Fe. Here again, however, the applicable standard does not change. The Commission properly exercised its obligation to weigh the pertinent factors bearing upon public convenience and necessity.

A number of minor issues remain. The fourth of the *Questions Presented* implies that appellant's parent corporation has been "excluded from the picture" despite the fact that it has given financial assistance to appellant. Neither the Commission nor the lower court excluded the Southern Pacific Company. On the contrary, as discussed immediately above, the Southern Pacific system was considered as a whole.

The fifth of the *Questions Presented* implies that the Commission based its decision upon a desire to maintain an uneconomic route for a competing railroad. If the Commission's decision maintains a route for the Santa Fe, however, such result is incidental. The Santa Fe was considered only in the sense that the revenues found

to be the cause of increased Southern Pacific profits following abandonment were found to have come from traffic lost by the Santa Fe and gained by the Southern Pacific. Whether the Santa Fe's route was "economic" from the carrier's point of view was not at issue in the case, except insofar as it influenced the Commission's finding (Jurisdictional Statement, Appendix B, page 18a) that "... the net effect [of abandonment] being that the three rail carriers as a group would not realize a net gain therefrom and the shipping public would derive fewer benefits."

Appellant's final contention is that the Commission omitted to apply the doctrine of *Purcell v. United States*, 315 U.S. 381 (1942). On the contrary the Commission (Jurisdictional Statement, Appendix B, page 15a) made specific reference to the *Purcell* case but declined to adopt any specific findings as to cost of freeway relocation because "[w]hile there is some evidence that abandonment might result in a savings to the State when expanding the parallel freeway, no definite plan or schedule for such expansion has been adopted by highway authorities and no specific changes in the highway system in the area are contemplated within the next 5 to 10 years."

A final word should be said about appellant's *Questions Presented*. They are largely rested upon erroneous factual assertions. Thus Question No. 1 asserts that the "railroad business in the area is declining, and in a territory that has little or no industrial or carload future," even though the Commission found to the contrary upon substantial evidence. Question No. 3 asserts a "future lack of potentials in that the railroad business in the area involved in the abandonment has been declining" and "there is little

or no industrial future," even though the Commission found to the contrary upon substantial evidence. Question No. 4 asserts that the Southern Pacific Company has been "excluded from the picture" even though the Commission specifically considered the effect of abandonment upon that company and also gave recognition to the fact that Southern Pacific Company had financed appellant's capital requirements through advances rather than having appellant issue bonds to the public in the sum of some $48,000,000. Question 5 implies that the Commission's order was made for the purpose of benefiting the Santa Fe although the Commission's decision shows that such was only an incidental effect.

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## CONCLUSION

This is an ordinary abandonment case, whose special features in no way modify the basic standard of public convenience and necessity set forth in Section 1(18) of the Interstate Commerce Act, as illuminated by *Colorado v. United States, supra.* An examination of the decisions below reveals that the Commission properly applied this standard and that the findings upon which the Commission's decision are based find ample support in the record considered as a whole under the rule of *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). Moreover, it was indicated in that case that the Supreme Court would ". . . intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." 340 U.S. at 491.

We respectfully submit that the decision of the District Court is plainly correct, that appellants have presented no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

BORIS H. LAKUSTA
*Attorney for Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc.; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., Appellees.*

GRAHAM JAMES & ROLPH
E. MYRON BULL, JR.
*Of Counsel*

Date: September 11, 1964.

(Appendix 1 Follows)

## Appendix I

ORDER

SERVICE DATE
JULY 11, 1963

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of July, A. D. 1963.

Finance Docket No. 21725

Northwestern Pacific Railroad Company Abandonment Between San Rafael and Forbes Overhead (Puerto Suello Tunnel), Marin County, Calif.

Upon consideration of the record in the above-entitled proceeding, including the petition of the Northwestern Pacific Railroad Company, filed June 18, 1963, under the provisions of section 1.101(a) (4) of the General Rules of Practice before the Commission, for a finding that this proceeding involves an issue of general transportation importance; and

*It appearing*, That no issue of general transportation importance is involved in the proceeding:

*It is ordered*, That said petition be, and it is hereby, denied.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

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FILED
SEP 14 1964
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1964

**No. 381**

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, et al., *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

## Motion to Affirm

FREDERICK G. PFROMMER
114 Sansome Street
San Francisco, California

*Attorney for The Atchison, Topeka and Santa Fe Railway Company, Appellee*

BORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

**No. 381**

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, et al., *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

## Motion to Affirm

The Atchison, Topeka and Santa Fe Railway Company, an intervening defendant below, and an appellee in the above-entitled cause, moves that the judgment of the District Court be affirmed on the ground that the questions presented on this appeal are so unsubstantial as not to need further argument.

### STATEMENT OF THE CASE

Appellant Northwestern Pacific Railroad Company, hereinafter referred to as NWP or appellant, operates a railroad in interstate commerce within the state of California

from a point near the Oregon border at Eureka, California, on the north, to a southern terminus at Tiburon, California, on San Francisco Bay, where it connects with The Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as Santa Fe. Santa Fe floats the freight cars to Richmond for movement beyond on its trains. Through routes and joint rates apply via the Tiburon interchange between Santa Fe and Northwestern Pacific. The Santa Fe ferries also operate to San Francisco under hire of NWP for connection with Southern Pacific Company, hereinafter sometimes referred to as SP, the parent of appellant. NWP has another terminus at Schellville, where it also connects with SP. This terminus is located on the northeastern edge of San Francisco Bay.

On July 20, 1961, appellant's Puerto Suello Tunnel was closed by cave-ins resulting from a fire. On August 21, 1961, appellant filed its application with the Interstate Commerce Commission under Sections 1(18)-1(21) of the Interstate Commerce Act for authority to abandon that portion of its main line approaching and through the tunnel. Approval of the application would leave the line south of the tunnel to and from Tiburon as an "island," closing the long existing "Tiburon gateway."

This matter, docketed as Finance Docket No. 21725, resulted in ten days of hearings at San Francisco, California. Hearing briefs were submitted and on September 17, 1962, the report of the hearing examiner was issued recommending that the application be denied. Exceptions were filed by appellant with the Interstate Commerce Commission and replies filed by the protesting parties. Oral argument was heard before the Interstate Commerce Commission, Division 3, in May of 1963, and the Commission, Division 3, issued its unanimous report in June, 1963, adopting the examiner's

report and adding additional explanation why the application should be denied. NWP thereafter filed a petition with the full Commission seeking a finding that an issue of general transportation importance was involved. After denial of said petition appellant filed its action in the District Court seeking to set aside the order of the Interstate Commerce Commission. Santa Fe intervened as a defendant, filed a brief, and participated in the ensuing oral argument. In its decision dated April 17, 1964, the District Court denied appellant's petition and dismissed the complaint. Every step of the way has been decided against petitioner.

Unlike most abandonment proceedings where the denial of the application requires the applicant to continue operations during the pendency of court review, there has been for over the past three years a *de facto* abandonment of the tunnel and the service through it. This has resulted in continued curtailed rail service to shippers and receivers south of the tunnel, and the through route NWP-Santa Fe with interchange at Tiburon has remained closed.

## QUESTIONS PRESENTED

It is, of course, the responsibility of the appellant to enumerate those questions which it deems of sufficient merit to warrant oral argument before the Court. However, appellant's statement of "Questions Presented" is no more than an outline of argument. Stated correctly the questions presented would more nearly read as follows:

1. Will rebuilding the tunnel constitute an undue burden on interstate commerce and appellant?

2. Was proper consideration given to the position of the parent, Southern Pacific Company?

3. Did the District Court hold correctly that the order of the Interstate Commerce Commission is not confiscatory?

4. Did the District Court hold correctly that the "Constitutional Fact Doctrine," as enunciated in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), is not applicable?

5. Is the decision of the Interstate Commerce Commission properly based upon considerations of public convenience and necessity?

6. Was the "substantial evidence rule" correctly applied by the District Court?

## ARGUMENT

Every contention in the petition has been fully considered and disposed of at one and more of the preceding stages of this litigation. Indeed appellee would stand on what has already been said in the unanimous opinions and orders of the hearing examiner, the Commission and the District Court, except that some specification and summarization seems advisable in the hope of reducing this Court's task.

### 1. The Reconstruction of the Tunnel Will Not Result in an Undue Burden Upon Interstate Commerce or Upon Appellant.

Appellant complains that the cost of rebuilding the tunnel will exceed its previous two years' net revenue. This is based on its cost estimate of approximately $850,000 to rebuild. In actuality appellant's evidence, based upon the use of all factors and matters most favorable to it, has shown that the appellant would actually be better off if the application were denied than if it were granted. Appellant's evidence showed, as stated by the examiner, that for 1959, 1960 and the first five months of 1961:

> "... NWP calculates that its net decreases in revenues if the tunnel had been closed in the described periods would have been $209,930, $154,570, and $60,476. Further offsetting the decreases in revenues by certain railway

> tax accruals and annual interest of 5 percent on certain capital costs allegedly avoidable by abandonment, it arrives at the somewhat smaller net decreases of $156,819, $101,656, and $38,478 [footnote omitted]." (Last seven lines, sheet 5, examiner's report; see also second full paragraph, 320 I.C.C. at 23.)

Appellant contends that the restoration of the tunnel would cost a minimum of $850,000 which would be equal to over two years' income and be a great burden upon it but still it must concede that if the tunnel is restored to operation, its net income would actually be increased in such proportion as to return more than 18 per cent per annum on its investment.

Appellant insists that the area south of the tunnel has little or no industrial or carload future, that the railroad business in the area has been declining and that alternate means of transportation service are available. The record contains uncontradicted statistical evidence of the number of cars of traffic originating or terminating at points south of the tunnel for the years from 1951 to 1960. The I.C.C. examiner found that the traffic handled as late as 1958 did not appreciably differ in volume from that handled in 1952. The volume in 1960 was the lowest for any year considered but there had been a definite upturn in net income of NWP for the first five months of 1961.

Furthermore, it must be remembered that the effects of the proposed abandonment will not be confined to main line points south of the tunnel. If appellant is allowed to abandon the tunnel the Tiburon gateway will remain closed, resulting in a loss of competitive rail service to many points outside of southern Marin County.

Whether adequate alternate means of transportation is available is best answered by quoting from the Commission's report:

"The segment herein proposed to be abandoned is a portion of the applicant's main line. Shippers located thereon, south of the tunnel, since its collapse have had their daily rail service decreased. Their all-rail route to and from northern and eastern points is cut off, and they are faced with the necessity of utilizing truck transportation which, as to certain commodities, involve higher costs with less satisfactory handling of traffic." (320 I.C.C. at 22.)

**2. Proper Consideration Was Given to the Position of the Parent, Southern Pacific Company**

Appellant insists that Southern Pacific Company, of which appellant is a wholly owned subsidiary, has been excluded from the picture. On the contrary both the examiner and the Commission expressly gave attention to the fact that if the application were granted Southern Pacific System's net revenues would be enhanced. As the Commission stated:

"Under the circumstances described, if the applicant were an independent carrier it would not be difficult to justify a denial. As stated, however, it is a member of the Southern Pacific System and as such, consideration must be given to the argument that while the applicant's revenue position in 1959, 1960, and the first 5 months of 1961 would have been adversely affected had the tunnel been closed, the combined revenues of the applicant and its parent would have been improved to such a degree that the system would have derived incomes exceeding the revenue decreases of the applicant. Although, as previously stated, the Southern Pacific System's income, as a result of the abandonment would be increased by $58,265, $33,722, and $21,476 for the described periods, the applicant in many instances will receive a lower division of the joint rate established via the alternate route than it

enjoyed when interchanging with the Santa Fe at Tiburon." (320 I.C.C. at 23-24.)

The Commission concluded:

> "Upon consideration of all the evidence of record we are not convinced that the benefits to the applicant and the Southern Pacific from the proposed abandonment through increased system revenues and avoidance of capital expenditures would outweigh the adverse effects which will be suffered by the shipping public should the application be granted." (320 I.C.C. at 24.)

Thus it can readily be seen the Southern Pacific Company was not "excluded from the picture" at all. Full consideration was given to the effect of the abandonment on NWP and NWP-SP. Appellant is merely aggrieved at the Commission's decision but such aggrievement cannot turn a fully litigated question into an appealable issue.

### 3. The Commission Order Is Not Confiscatory.

As is pointed out earlier, appellant's evidence clearly shows, and the Commission found, that the net income of NWP would be substantially greater if the application were denied than if it were granted. There is obviously then no taking of property without due process by a denial of the application.

NWP was the sole applicant before the Commission and is the sole appellant in this Court. It is apparently appellant's claim that Southern Pacific Company property is being taken without due process. Nothing in this record would support such a claim. As the Commission said: ". . . the question to be resolved is a matter of only the degree of profits by the railroads." The evidence shows only that the Southern Pacific System's net revenues would be en-

hanced if the application were granted. Under these circumstances the order of the I.C.C. cannot be confiscatory.

It is readily apparent that there is in fact no confiscation and that the issue of confiscation was merely contrived as a means of seeking trial *de novo*. The real issue remains purely one of public convenience and necessity and there is no issue of constitutional rights. The courts have disposed of contentions similar to appellant's as follows: The right to conduct a common carrier business is not plenary but subject to many limitations, and denial of this qualified right is not a denial of a constitutional right calling for the court to exercise its independent judgment on the facts. *Transamerican Freight Lines, Inc. v. United States*, 51 F. Supp. 405 (D.C. Del. 1943); a utility cannot raise a constitutional issue as a subterfuge where the real issue involved is whether regulatory authority had been validly exercised. *Lang Transp. Corp. v. United States*, 75 F.Supp. 915 (S.D. Cal. 1948); the claim that an order deprives a carrier of liberty and property contrary to the Fifth Amendment will not be considered where such claim is a subterfuge predicated on the invalidity of an I.C.C. order. *Baltimore & O. R.R. v. United States*, 305 U.S. 507 (1939).

**4. The Constitutional Fact Doctrine Is Not Applicable.**

Appellant insists, the District Court holding otherwise, that the "constitutional fact doctrine" as enunciated in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) is applicable to this proceeding and that the District Court should have exercised its independent judicial judgment as to both the law and the facts.

The *Ben Avon* case involved the setting of water rates for the future, the utility claiming confiscation of its property caused by the level of the rates. The Supreme Court

held that the reviewing court could determine the question of confiscation according to its own independent judgment both as to the law and the facts. However the doctrine has never been applied in other than rate cases; see, e.g., *Railroad Comm'n of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), applying the substantial evidence test. In *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 348 (1951) this Court made it abundantly clear that the "constitutional fact doctrine" has no application to abandonment proceeding. The Court concluded:

> ". . . whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. [Citations omitted.]"

**5. The Decision Is Based Upon Considerations of Public Convenience and Necessity.**

Appellant suggests that the decision of the Interstate Commerce Commission will require it to rebuild the tunnel and restore an uneconomic route through the tunnel for the benefit of the Santa Fe. Appellant's position of course assumes that there are other adequate service routes, but the Commission did not find this to be the fact. Moreover, while it is true the denial of the application will result in preservation of the long existing through routes and joint rates via Tiburon, which will benefit Santa Fe, the Commission's decision is premised on the fact that preservation of the Tiburon interchange is required as a matter of public convenience and necessity.

The undisputed evidence, as taken from appellant's exhibits shows that:

> ". . . out of 15,095 carload shipments handled by applicant in 1959 between main line points south of the

tunnel (including San Francisco) on the one hand, and main line and branch points north of the tunnel on the other, some 10,024 carloads were interchanged at Tiburon. In 1960, 7,948 out of 12,124 cars used the Tiburon gateway and for the first 5 months of 1961, 3,324 out of 5,117 cars used that point of interchange." (320 I.C.C. at 22-23.)

The interchange with Santa Fe at Tiburon was a part of a movement at joint rates over through routes. If the application had been granted, the interchange at Tiburon and the long existing through routes and joint rates between NWP and Santa Fe would be virtually eliminated. Traffic which would have been interchanged at Tiburon and moved through the tunnel would be diverted to the Schellville interchange where NWP makes connection with Southern Pacific, rather than Santa Fe.

One important effect of this diversion became apparent immediately. Prior to the tunnel closure there was six day per week rail service via Tiburon. Since the fire and the consequent diversion of traffic from the Tiburon interchange, the service has had to be reduced to twice weekly south of the tunnel. As the examiner observed:

> "In the five months ending December 31, 1960, prior to the tunnel fire, 3,392 carload shipments were interchanged at Tiburon, of which 3,107 were delivered to Santa Fe and 285 were received. In the five months ended December 31, 1961, NWP delivered 75 cars to Santa Fe at Tiburon and received 41 for a total of 116 carload shipments. Revenues accruing to Santa Fe on traffic moving via Tiburon declined from $700,955 for the first period to $36,972 in the second." (Sheet 5, examiner's report.)

The examiner found:

> "The protesting shippers regard the rail service as having been satisfactory prior to closing of the tunnel,

but since that time have experienced reduction from daily to twice-weekly service with accompanying fluctuations in transit time, bunching of deliveries, and other inconveniences." (Sheet 7, examiner's report.)

The Tiburon route was important. As pointed out previously, in 1959 for example, over 10,000 cars moved via the Tiburon gateway through this tunnel. The examiner found that:

"Shippers obtained faster service for certain traffic when the Tiburon route was specified and on that account such route was used even though the rates sometimes were lower via Schellville. In one test period, July and October, 1960, and January and April, 1961, some 129 out of 716 carload shipments routed via Tiburon could have been routed via Schellville at lower transportation costs." (Sheet 6, examiner's report.)

In light of all the facts the examiner's finding was that:

"The through route maintained by NWP and Santa Fe via Tiburon reflects a material and valuable contribution to the interstate and intrastate transportation system in the area. It is demonstrated that such system is capable of affording daily service by railroad at NWP main line points when both of the major roads connecting with NWP have opportunity to compete for the involved traffic." (Sheet 8, examiner's report.)

Moreover, appellant conceded that the granting of the application and the resulting diversion of traffic to the Schellville route would transfer very substantial revenues from both Santa Fe and NWP to SP. Its testimony was that SP's gross revenues would be increased $602,088 annually, based on the 1959 traffic levels, created by a diversion in gross revenue of $169,544 from appellant and $432,544 from Santa Fe.

To offset this gross revenue loss of over $432,000, Santa Fe would reduce its expenses by only $20,000. The examiner found:

> "As the frequency of Santa Fe schedules to and from its rail terminus at Richmond is not dictated alone by the amount of the Tiburon interchange, there would be little saving of rail costs, but it is estimated that reduction in the frequency of car ferry service between Richmond and Tiburon would produce savings of about $20,000 a year." (Sheet 6, examiner's report.)

So, in addition to the deterioration of service which would follow the granting of this application, the abandonment of this line would divert a very substantial amount of revenue from Santa Fe, not to appellant, but to appellant's parent, Southern Pacific Company, with only relatively insignificant reductions in Santa Fe's operating expense to accompany the loss of revenue.

### 6. The Substantial Evidence Rule Was Correctly Applied by the District Court.

The District Court did not outline the testimony and data upon which its findings were based. It merely stated that there was substantial evidence to support the examiner's findings. Surely no other conclusion could be reached.

Appellant's use of the doctrine of *Purcell v. United States*, 315 U.S. 381 (1942) is incorrect. *Purcell* merely held that the Commission may authorize abandonment where the line would be destroyed by a federal flood control project, and that the relocation cost is a relevant factor to consider. In the present situation, plans to widen the highway at the location of the present tunnel have not been definitely adopted and no actual construction work is contemplated for five to ten years. No exact estimate of the cost of the

project has been prepared and indeed alternatives were still being studied. On such inconclusive evidence certainly the Commission and the District Court would be entitled to ignore any speculative costs which the State may incur by reason of the tunnel not being abandoned. Moreover, the Commission found that unlike *Purcell*, "no superior benefits are to be derived by the public through abandonment of the segment in question."

Appellant finds fault with the Commission's use of the revenue of the entire NWP system, instead of that of the area where the line was sought to be abandoned, in determining that the system revenue of previous years was an "indication that the need for transportation in the area is not undergoing an immediate decline." Appellant feels that such a finding would preclude abandonment in all situations where there is a system net and violates the rationale of *Southern Ry. v. North Carolina*, 376 U.S. 93 (1964).

Read in context, we simply do not perceive how the Commission's language conflicts in any way with the *Southern* case.

## CONCLUSION

It is submitted that the foregoing arguments show that the District Court ruled correctly on the questions sought to be presented on this appeal, and that the questions are so unsubstantial as not to need further argument. Accordingly, the Motion to Affirm should be granted.

Respectfully submitted,

FREDERICK G. PFROMMER
114 Sansome Street
San Francisco, California

*Attorney for The Atchison, Topeka and Santa Fe Railway Company, Appellee*

## CERTIFICATE OF SERVICE

I, FREDERICK G. PFROMMER, attorney for The Atchison, Topeka and Santa Fe Railway Company, one of the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September 17, 1964, at San Francisco, California, I served copies of the foregoing Motion to Affirm on the several parties hereto, as follows:

1. On the United States, by mailing a copy in a properly addressed envelope, with airmail postage prepaid, to The Solicitor General, William H. Orrick, Jr., Esq., Assistant Attorney General, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D.C., and with first-class postage prepaid to Cecil F. Poole, Esq., United States Attorney, for the Northern District of California, at Room 422, Post Office Building, San Francisco, California.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with airmail postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Robert S. Burk, Esq., its Attorney, Interstate Commerce Commission, Washington 25, D.C.

3. On the Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Cangros Gravel and Fuel Co., Inc.; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., intervening defendants, by mailing copies in a duly addressed

envelope, with first-class postage prepaid to their respective attorneys of record:

Graham, James & Rolph,
Boris H. Lakusta, Esq.
F. Myron Bull, Jr., Esq.
310 Sansome Street
San Francisco, California 94104

4. On The People of the State of California and The Public Utilities Commission of California, intervening defendants, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record:

Richard E. Tuttle, Esq.
Hector Anninos, Esq.
State Building
San Francisco, California

5. On the appellant, Northwestern Pacific Railroad Company, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to its attorney of record:

Randolph Karr, Esq.
670 Pacific Electric Building
610 South Main Street
Los Angeles, California 90014

FREDERICK G. PFROMMER

Office-Supreme Court, U.S.
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SEP 14 1964
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# In the Supreme Court of the United States

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On Appeal from the United States District Court for the Northern District of California, Southern Division

## Motion to Affirm

RICHARD E. TUTTLE
J. THOMASON PHILLIPS
HECTOR ARINOS
5072 State Building
San Francisco, California 94102

*Attorneys for the Public Utilities Commission of California and the People of the State of California, Appellees.*

Dated: September 11, 1964

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On Appeal from the United States District Court for the Northern District of California, Southern Division

## Motion to Affirm

Appellees Public Utilities Commission of California and the People of the State of California move to affirm on the grounds that the appeal and the questions presented therein are so unsubstantial as not to need further argument.

I.

### JURISDICTION AND AUTHORITY OF THE INTERSTATE COMMERCE COMMISSION IN ABANDONMENT PROCEEDINGS

Section 1(18) of the Interstate Commerce Act provides that no portion of a line of railroad[1] shall be abandoned

1. For easy reference there is attached as an appendix a map

unless there is first obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity permit such action. Subsequent to the enactment of this section in the Transportation Act of 1920 the United States Supreme Court, in *Colorado v. United States*, 271 U.S. 153, 70 L.ed. 878 (1925), first passed upon the constitutionality of the section and enunciated the basis for the extension of federal jurisdiction to an area, theretofore within the purview of the states. That opinion has retained its validity, is still quoted as the leading authority on the subject and is, in fact, cited and quoted in the Interstate Commerce Commission opinion complained of here. (Appendix B to Jurisdictional Statement, p. 17a.)

It is evident from the *Colorado* case that the view of this Court was that the objective of Sections 1(18-20) is the protection of interstate commerce from *undue burdens* and not the protection of the railroad. (*Colorado v. United States*, *supra*, at page 162.) As noted further at page 163, the sole criterion prescribed in the statute is that abandonment be consistent with public convenience and necessity. This test of "undue burden" was adopted by the Interstate Commerce Commission and utilized over the years in abandonment proceedings. (See e.g., *New York Central Railroad Company Abandonment*, F.D. 13914, 254 ICC 745, 763 (1944)). Congress itself then, in the Transportation Act of 1958, affirmed the continuing validity of the test of undue burden on interstate commerce by incorporating that precise language in Sections 13a(1) and (2) of the Interstate Commerce Act in addition to the usual test of public convenience and necessity.[2]

2. Sections 13a(1) and (2) give the Interstate Commerce Commission jurisdiction for the first time to authorize discontinuance

As implemented by the Interstate Commerce Commission and interpreted by the courts, it is apparent that although an express finding of whether a burden exists upon interstate commerce is not expressly required by Section 1(18), it is nevertheless implicit in the determination of the statutory criterion of what is consistent with the public convenience and necessity. (*Colorado v. United States, supra; Transit Commission v. United States*, 284 U.S. 360, 367, 76 L.ed. 342 (1932).) Pursuant to this approach the Interstate Commerce Commission has consistently arrived at its determination of public convenience and necessity by weighing the public need for the continuation of the service on the one hand against the existence and degree of the burden upon interstate commerce on the other hand. (*New York Central Railroad Company Abandonment*, F.D. 13914, 254 ICC 745, 763 (1944).)

California submits that evidence that there is an undue burden upon the carrier—and consequently upon interstate commerce—to be eliminated by abandonment is a necessary part of any showing in an abandonment proceeding and that lacking such evidence the certificate authorizing abandonment cannot issue.[3] As will be shown below, no finding of unprofitable operation and resulting undue burden could possibly have been made on this record. Appellant made no

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of a *particular train* on a line of railroad as opposed to the discontinuance of *all* service and abandonment of the line. (*Southern Ry. Co. v. North Carolina*, 376 U.S. 93, 11 L.ed. 2d 541, 547 (1964).)

3. The only apparent exception is the group of cases where the abandonment was dictated by an overriding public need occasioned by flood control, civic projects, highway construction, etc. (See e.g., *Confluence & O.R. Co., Abandonment*, 244 ICC 451 (1942) and 247 ICC 399 (1941); *Purcell v. United States*, 315 U.S. 381 (1942); *Oakland Terminal Railway, Abandonment*, F.D. 20235, not printed (1959); *Feather River Railway Co., Abandonment*, F.D. 22060, ... ICC ... (1964).)

pretense that such was the case and, in fact, freely conceded in its evidence that the Northwestern Pacific, as a separate entity, would actually be in a more advantageous position financially if the tunnel were rebuilt.

## II.

## THERE IS NO BURDEN UPON INTERSTATE COMMERCE TO BE ELIMINATED BY GRANTING THE CERTIFICATE TO ABANDON

Evidence introduced by Appellant showed on its face that there was no loss to Appellant to be reduced or eliminated by the abandonment, but that, in fact, Appellant's profits would be substantially reduced rather than improved. This may be ascertained by reference to Appellant's Exhibit No. 4, page 4, bottom line, in which it is established that in the test years 1959 and 1960 and the first five months of 1961 (up to the date of the fire) the Appellant earned respectively $156,819, $101,656 and $38,478 in net profits which could not have been earned had the tunnel not then been in operation. (pps. 17a and 18a of Appendix to Jurisdictional Statement. See generally Exh. No. 56, pp. 1-1 through 1-4.) For 1960, the last full year of operation through the tunnel, Appellant enjoyed net profits 37% higher than it would have realized had the tunnel been closed. Appellant's proposal is, therefore, destructive and self-defeating and would not conceivably be made if Appellant were an independent corporate entity acting in its own best interest. The Appellant is in the position of establishing by its showing that, as to the Northwestern Pacific entity, unprofitable operations and burdens upon interstate commerce are more likely to be created rather than alleviated if its abandonment plan is authorized.

The reason for this unusual proposal is also made clear by Exhibit No. 4, at page 6. Benefits to the parent Southern

Pacific would far exceed any loss to Appellant so that the net effect of the abandonment would be to Southern Pacific's system-wide advantage. Some of the benefit gained by Southern Pacific would be at the expense of its wholly-owned subsidiary, but most would be gained from its competitor, The Atchison, Topeka and Santa Fe Railway Company, by diversion of traffic from the Tiburon gateway to Southern Pacific's Schellville route.[4] None of the above facts are in dispute since they are established by Appellant's own evidence. Despite the clear intent of the statutes and the cases, as set forth in paragraph I above, to base abandonment authorizations upon the proper tests of public convenience and necessity and burden upon interstate commerce resulting from operations conducted at a loss, Appellant has premised its case upon the theory that abandonment of a profitable line of railroad is justified if it can be shown that a parent corporation (not a party to the proceeding) will thereby add to its system profits by diverting traffic from a competitor.

Lacking any issue of burden upon interstate commerce, the only relevant issue which remained was that of the continued public need for the service. Numerous shipper and receiver witnesses testified as to their former dependence upon the direct and frequent rail service before the fire. They complained of the present complete loss of service in the case of some commodities; and the curtailed and inadequate service now existing as to other commodities. Shippers did not consider truck service to be an adequate

4 Appellant's Exhibit No. 4 shows at page 5 increased revenues to Southern Pacific for 1959 of $602,088, assuming the tunnel had been closed in that year. Of this amount $169,544 represents revenue lost by Appellant due to the abandonment. The remainder, $432,544, by admission of Appellant's witness (Tr. 464), represents revenues gained by Southern Pacific at the expense of Santa Fe.

substitute for the prior rail service. Upon evaluation of all the evidence the Commission concluded (p 18a of Appendix to Jurisdictional Statement) that the benefits to Appellant and Southern Pacific would not exceed the adverse effects upon the shipping public; that the area in question could in the forseeable future generate sufficient revenue to justify restoration; and that despite the expenditure to repair the tunnel the Appellant could continue its profitable operations as in the past.

As indicated in the *Colorado* case, *supra*, the public need for the service should be weighed against the burden upon interstate commerce to be removed if the service is eliminated. Here, in exchange for a serious service loss to the shipping public, no benefit to interstate commerce is discernible. It cannot even be claimed that savings and economies will result overall which can be passed on to shippers since, as the decision of the Commission states, based upon Appellant's own figures (p. 18a, Appendix to Jurisdictional Statement), the net effect of the abandonment if all three railroads are considered would be a loss, since the gain to Southern Pacific would be far surpassed by the revenue losses resulting for Santa Fe and for Appellant. Lacking any issue of losses and burden upon interstate commerce the dispute resolves itself to what the Commission decision aptly describes (page 18a of Appendix to Jurisdictional Statement) as:

> ". . . a matter of only the degree of profits by the railroads on the one hand as against a loss by the shipping public through fewer facilities for rail transportation and a less efficient, slower service, . . . ."

The California Commission will go further and state that this proceeding is nothing but a contest for competitive advantage between two prosperous carriers, Southern Pa-

cific and Santa Fe, with Southern Pacific attempting to take advantage of an unfortunate act of arson by juveniles in order to disturb routes which have existed for many years to the satisfaction of the public and which have been profitable to one degree or another for all participating carriers. We seriously question the jurisdiction of the Interstate Commerce Commission to authorize an abandonment—absent an issue of burden upon interstate commerce—which while curtailing service to the public, offers only a shifting, or realignment of traffic and revenues between prosperous carriers.

At pages 3 and 9 of the Jurisdictional Statemen mention is made of the debt of $48,000,000 owed by Appellant to the parent Southern Pacific. This fact is unfortunate, but it is no justification for an abandonment which will severely cut into Appellant's profits. The record shows (Exhibit A to Return To Questionnaire) that Appellant has been making payments on this indebtedness with some regularity and has reduced the debt from almost $56,000,000 in 1947 to its present level. It is obvious that the fact of the indebtedness militates against abandonment rather than in favor of it since the sharp reduction in Appellant's profits which would follow would interfere with, if not eliminate, Appellant's ability to continue the payments.

## III.

## THE PUBLIC NEED FOR THE SERVICE

The test prescribed in Section 1(18) in issuing certificates authorizing abandonment is that of determining the "present or future public convenience and necessity". Such a broad generalization gives considerable latitude to the Interstate Commerce Commission to exercise judgment and discretion based upon its administrative expertise. The

Commission must not only consider past experience and present need for the service, it must engage in admitted speculation as to what the future may hold as to a particular area with respect to commercial and industrial trends, population changes, etc. In determining the issue of public convenience and necessity for certificate purposes, it has been held that the Commission acts *administratively* (not judicially or legislatively) (*Lang Transportation Corp. v. United States*, 75 F.Supp. 915, 926-928 (1948)). The wide range of discretionary authority vested in the Commission when it acts administratively was clearly described by this Court in *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236 90 L.ed. 38 (1943) as follows at page 241:

> ". . . The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of the function the Commission has been entrusted with a wide range of discretionary authority. Interstate Commerce Commission v. Parker, 326 U.S. 60, 89 L.ed 2051, 65 S.Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See Chesapeake & O. R. Co. v. United States, 283 U.S. 35, 42, 75 L.ed. 824, 829, 51 S.Ct. 337; Alton R. Co. v. United States, 315 U.S. 15, 23, 86 L.ed. 586, 595, 62 S.Ct. 432."

The record here is voluminous. There were ten days of hearing before the Commission, 65 exhibits, most of them

statistical or technical in nature, were received and numerous witnesses testified. As might be expected in a proceeding of this nature, much of the evidence was conflicting. Appellant's principal argument in the Jurisdictional Statement appears to be its claim that the area in question lacks industrial potential and does not present an attractive picture for future rail operations. There was considerable conflicting evidence on this issue. The recommended report of the examiner (Appendix C to Jurisdictional Statement, at p. 31a) makes detailed findings from the conflicting evidence which support his conclusion that the potential of the area justifies restoration of the service. The decision of the Commission adopts the findings of the recommended report (320 ICC 19 at p. 20) and concludes itself that transportation in the area is not undergoing an immediate decline (320 ICC 19 at p. 23). As stated by this Court in *United States v. Detroit & Cleveland Navigation Co., (supra)*, at page 240, a determination of "present or future public convenience and necessity . . . entails a prophecy, so far as future requirements are concerned." It is evident from the facts of this proceeding that the Interstate Commerce Commission in great measure based its refusal to grant the certificate to abandon upon its expert estimate and appraisal of the future need of the shipping public for rail service in southern Marin County. The Appellant now asks this Court to sift the evidence and substitute its own prophecy for the future.

Appellant's argument that the decision of the Interstate Commerce Commission will require it to expend money to restore and operate a route for the benefit of another railroad, the Santa Fe, is obviously inappropriate. There is no question but what the Santa Fe will benefit from restoration of the tunnel, but it will not gain a new advantage

at the expense of the Southern Pacific. Rather, it will have restored to it the traffic which it has benefited from over the years. It is the Southern Pacific which now attempts to make capital of an act of juvenile vandalism by utilizing it as justification for an abandonment which otherwise has no basis.

## IV.

## THE CONSTITUTIONAL FACT DOCTRINE IS NOT APPLICABLE IN THIS PROCEEDING

Appellant attempts to invoke what it terms the "constitutional fact" doctrine which would require this Court to exercise its independent judicial judgment as to both the law and the facts on the basis that the decision complained of is confiscatory. This, of course, is the familiar *Ben Avon* doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 64 L.ed. 909 (1920) which is the only case Appellant cites. The first answer to this contention is that supplied by the opinion of the three judge district court appealed from here (228 F.Supp. 690 at 693) wherein it is noted that in rate review cases a rate is confiscatory only if it results in an overall loss of net profits to the petitioning railroad. In other words, a rate may render a particular service unprofitable, but as long as the entire system realizes a profit there is no confiscation. (*E. & O. R. Co. v. United States*, 345 U.S. 146, 148; 97 L.ed. 912 (1953).) After reference to language in the recent case of *Southern Railway v. North Carolina*, 376 U.S. 93, 11 L.ed. 2d 541 (1964), the Court concluded that the same standard could be applied in abandonment cases and that no confiscation could result from an order of the Interstate Commerce Commission denying an abandonment as long as there is no net loss to the overall system. In the instant proceeding, as indicated

above, there was no system loss whether Appellant was considered as an independent entity or as a part of the Southern Pacific system, *nor was there any loss on the particular service sought to be abandoned.*

The *Ben Avon* doctrine is not applicable for other reasons. The case was concerned with an order by the Public Service Commission of Pennsylvania establishing water rates for the future, which action the decision took care to note was legislative in nature. The decision did conclude that in such cases the reviewing tribunal must exercise its independent judgment as to both the law and the facts, but in so holding it was a clear departure from previous law. (Davis—Adm. Law Treatise, Vol. 4, p. 164.). More significant is the line of cases which came after the *Ben Avon* case. In *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38; 80 L.ed. 1033 (1936) this Court seriously qualified the *Ben Avon* rule. While yet seeming to adhere to the "independent judgment" premise, it was made clear that such judgment was none the less independent even though it relied in some measure upon the prior administrative judgment. An authoritative view was that the qualification had the practical effect of restoring the prior test of substantial evidence. (Davis—Adm. Law Treatise, Vol. 4, p. 155.)

In *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573; 84 L.ed. 1368 (1940) (Opinion amended 311 U.S. 614; 311 U.S. 570 (1941)), and in *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575; 86 L.ed. 1037 (1942) the concept of independent judicial judgment appears to have given way and the substantial evidence test restored. By 1951 this Court was able to state as follows in *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341; 95 L.ed. 1002 (1951) at page 348:

> ". . . when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to

relitigate factual questions on the ground that constitutional rights are involved." (citing cases.)

On the facts, the *Alabama* case appears to be most pertinent to this proceeding since the Alabama Commission had found an existing public need for a particular rail service despite a financial loss in providing same, which caused the railroad to complain of a confiscation of its property in violation of the due process clause of the Fourteeth Amendment. It is submitted that as to matters which have been entrusted to an expert administrative agency such as the Interstate Commerce Commission for initial determination, the substantial evidence rule now applies and the *Ben Avon* doctrine is discredited.

## V.

## CONCLUSION

Because of the basic flaw explained above Appellant found itself in the most incongruous position of attempting to abandon a profitable operation. The only discernible benefit in the entire proposal was that which flowed through to Appellant's parent, the Southern Pacific. Nothing would be gained in the public interest by the abandonment since there is no burden upon interstate commerce to be eased or eliminated. The shipping public on the other hand would be damaged by the loss of good and frequent rail service which has been profitable to the participating carriers. The California Commission has had long experience in regulating rail carriers in California. We have followed this proceeding closely, participated actively from its inception, and must conclude that the entire proposal is nothing more than

a thinly disguised attempt to divert traffic from a competitor while purporting to act in the public interest. The opinion of the District Court should be affirmed.

Respectfully submitted,

RICHARD E. TUTTLE
Chief Counsel

J. THOMASON PHELPS
Principal Counsel

HECTOR ANNINOS
Senior Counsel

*Attorneys for the Public Utilities Commission of California and the People of the State of California, Appellees.*

Dated: San Francisco, California
September 11, 1964.

**(Appendix Follows)**

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY,
APPELLANT

*v.*

INTERSTATE COMMERCE COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

## MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a judgment (J.S. 10a) of a three-judge district court dismissing appellant's suit to set aside an order of the Interstate Commerce Commission. The order of the Commission (J.S. 19a), entered in *Northwestern Pac. R. Co. Abandonment*, 320 I.C.C. 19, denied appellant's application for authority to abandon approximately two and one-half



744-914—64

miles of its main line of railroad. Abandonment of this segment was sought as a result of destruction by fire of a tunnel in 1961 and, if approved, would have severed over 95 percent of appellant's main north-south line from both a branch line and the main line's southern terminus at Tiburon on the northern shore of San Francisco Bay. Traffic is interchanged with the Atchison, Topeka and Santa Fe at Tiburon for movement from and to the Bay area and beyond. Traffic from appellant's northern segment destined for the San Francisco terminal area and beyond has, since destruction of the tunnel, been routed over appellant's lines to Schellville, where interchange is made with appellant's parent, the Southern Pacific Company.

The abandonment application was opposed by affected shippers and communities, the State and Public Utilities Commission of California, and the Santa Fe. After a full hearing, the examiner wrote a report (J.S. 21a–35a) in which he weighed the possible cost to appellant of the resumption of operations (and the resultant possible burden on interstate commerce) against the present and prospective loss to the general public, shippers, and other carriers, resulting from abandonment. He concluded, on the basis of appellant's own evidence, that it would realize net revenues from continued operations through the tunnel sufficient to justify reconstruction and resumption of service, and that such action, therefore, would cast no burden upon interstate commerce (J.S. 28a, 33a–34a). On the other hand, the examiner found that the public, the shippers, and the area railroads as a group were

suffering specific and heavy losses from the *de facto* abandonment pending rebuilding of the tunnel, which losses would continue in the future if permission to abandon were granted (J.S. 31a, 34a).

The Commission, Division 3, adopted the examiner's findings and agreed with his conclusion (J.S. 12a) that appellant had not shown, as required by Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), that the present and future public convenience and necessity permit the abandonment. The Commission concluded: "Reconstruction of the tunnel will not result in an undue burden upon interstate commerce or upon applicant. When the question to be resolved is a matter of only the degree of profits by the railroads on the one hand as against a loss by the shipping public through fewer facilities for rail transportation and a less efficient, slower service, it must be resolved in favor of the public" (J.S. 19a). Accordingly, the application to abandon was denied.

The three-judge district court unanimously sustained the Commission's decision (J.S. 1a–10a). It reviewed the entire record, and held that the Commission's findings were supported by substantial evidence (J.S. 10a).

## ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

Here, as in the court below, appellant relies upon the "constitutional fact" doctrine of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, and argues that, because it asserted an unconstitutional confiscation of property, the district court erred in

not making an independent judgment on the facts (J.S. 3, 9). Putting to one side questions concerning the vitality of that doctrine (see, 4 Davis, *Administrative Law*, § 29.09, pp. 167, 180), it is clear that "the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the [agency's] power unless confiscation is clearly established." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53.

The court below found the claim of confiscation to be without substance here (J.S. 6a). It affirmed the Commission's finding (J.S. 19a, 28a, 33a–34a) that reconstruction of the tunnel and resumption of service would actually produce a net profit for appellant (J.S. 8a). Indeed, appellant Northwestern Pacific would actually suffer net losses from the abandonment: the beneficiary of abandonment would be its parent, the Southern Pacific. The Commission found that this result would flow from the alternate route interchange of traffic with the Southern Pacific at Schellville, rather than with the Santa Fé via the tunnel at Tiburon (J.S. 13a, 17a). Clearly, there is no force to appellant's contention that it is confiscatory for the Commission, by ordering restoration of the tunnel, to require Northwestern Pacific to accept the profits resulting from operation via Tiburon and interchange with the Santa Fe, even though this results in lesser profits to its parent, the Southern Pacific.

Appellant's remaining arguments—reflected in its statement of the "Questions Presented"—rest largely upon factual assertions contrary to the express findings of the Commission and the court below. For

example, it is repeatedly asserted that the Commission erred in looking "only to the past revenues and business, not the future potential" (J.S. 7). But, after considering such factors as continuing shipper need for the rail service, the inadequacy of substitute modes (J.S. 16a, 31a), and the greater efficiency for future traffic of the route sought to be abandoned as compared to the remaining alternate route (J.S. 16a–17a, 29a–30a), the Commission specifically found that the surrounding area "will in the foreseeable future generate sufficient traffic and revenues to support the [tunnel] restoration program and the continued through service" (J.S. 19a, 32a).[1] Upon review of the Commission's action, the court below concluded that there was substantial evidence to support the finding that "no long-run losses would be incurred by plaintiff in its over-all system" (J.S. 10a).

The Commission performed its duty to find the facts, draw the inferences, and balance the respective interests and then arrived at a determination that abandonment would not be consistent with the public convenience and necessity. 49 U.S.C. 1(18); *Colorado* v. *United States*, 271 U.S. 153, 166–169. "Bearing in mind the tests enunciated in *Universal Camera Corp.*

[1] Although appellant asserts that the cost of rebuilding the tunnel would exceed the previous two years' net revenue for the entire railroad (J.S. 9), a more meaningful measure of this cost is the net return to be expected on this investment. The record shows that the cost of reconstruction is $851,655, less $200,729 insurance payment, or a net cost of $650,935 (J.S. 13a). At 1960 and 1961 levels, net profits on operations through the tunnel were $101,656 and (on a twelve-month basis) $92,340, respectively, which would be approximately a 16% and 14% net return on capital invested (J.S. 17a).

v. *National Labor Relations Board*, 340 U.S. 474," (J.S. 10a), the district court reviewed the record and concluded that the findings of the Commission were adequately supported by substantial evidence. There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States*, 341 U.S. 412; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*
WILLIAM H. ORRICK, JR.,
*Assistant Attorney General.*
ROBERT B. HUMMEL,
ARTHUR J. MURPHY, JR.,
*Attorneys.*

ROBERT W. GINNANE,
*General Counsel,*
ROBERT S. BURK,
*Attorney,*
*Interstate Commerce Commission.*

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IN THE

# Supreme Court of the United States

October Term, 1964
No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY,
*Appellant,*

*vs.*

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA, and CITY OF SAN RAFAEL, *et al.*,
*Appellees.*

**On Appeal From the United States District Court for the Nothern District of California, Southern Division.**

## PETITION FOR REHEARING.

RANDOLPH KARR,
670 Pacific Electric Building,
Los Angeles, Calif. 90014,
*Attorney for Appellant.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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*vs.*

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, and CITY OF SAN RAFAEL, *et al.*,
*Appellees.*

**On Appeal From the United States District Court for the Nothern District of California, Southern Division.**

## PETITION FOR REHEARING.

Now Comes the appellant, Northwestern Pacific Railroad Company, by its counsel, and respectfully prays for a writ of rehearing of this case.

The Jurisdictional Statement previously filed herein presented as one of the questions:

> "3. Whether the net loss doctrine is applicable where the past and present revenues are considered, in view of the future lack of potentials in that the railroad business in the area involved, in the abandonment has been declining, there is little or no industrial future, and where alternate means of transportation service is available or provided."

There are two matters of importance to the railroad industry wherein the case below has changed the applicable law and represent a radical departure from the previous decisions of the Court.

## The Relation of Unprofitable Segments of a Railroad to the Over-All System.

The court below in *Northwestern Pacific Railroad Company v. United States*, 238 F. Supp. 690, 694 (1964) erroneously applied the case of *Southern R. Co. v. North Carolina*, 376 U. S. 93, 103 (1964) when the court below held:

> "Consequently, we hold that no confiscation results from an order of the Interstate Commerce Commission denying the abandonment of rail services which are shown to be unprofitable, as long as there is no net loss to the over-all system."

in that it completely ignored footnote 16, pages 103-104 of the *Southern R. Co.* case, *supra*, wherein the court said:

> "neither . . . nor the profitability of all operations within any given State bears any practical relationship either to the public's need for the service in question or to the burden which the deficit imposes on interstate commerce."

The application of the District Court's language to an abandonment matter has the effect of setting aside and completely upsetting the rule of law announced in *Colorado v. United States*, 271 U. S. 152 and *Southern R. Co. v. North Carolina*, 376 U. S. 93, 100 (1964).

## The Yardstick of Determining Long Run Losses.

The Commission and the court below used past revenues or business to determine future revenues or business and losses or profits.*

The method of using past revenues to determine future revenues may be proper if conditions are expected to be the same. However, in this case evidence was uncontradicted that conditions in the future would not continue as existed in the past, that is, future revenues bear no relation to past revenues.

There were two kinds of rail traffic in the area in question. Both types of traffic were in a downward decline. One type was traffic that originated or was destined in the area. This traffic in 1959 (if the local rock, sand and gravel traffic is eliminated) was 5.7 cars per day and in 1960 had fallen to 4.6 cars per day. The other type of traffic was bridge traffic carried through the area that originated from or was destined to the Santa Fe at Tiburon. This traffic had declined from 25 to 30% between 1959 and 1960.

The evidence was uncontradicted that the existing unoccupied land adjacent to the railroad was too expensive for carload industrial potential or use, and that the three principal industries in San Rafael, that is, the rock, sand and gravel operators, would be removed and forced out of their present locations by a future freeway with a resulting loss of their business in the area.

*The Interstate Commerce Commission in abandonment cases requires the applicant to file a Return to Questionnaire, 49 C. F. R. 42.6, that provides the applicant shall state the applicant's railway operating revenue for each of the last two calendar years, and for that part of the current year for which the information is available (49 C. F. R. 42.6 (14.c) that is used as evidence.

Thus, the use of past business to support a statement that future revenues would be the same is without authority in law. (*Universal Camera Corp. v. Labor Board*, 340 U. S. 474 (1951).)

Further, to compound its error, the Commission in its decision took the revenue of the whole system, not the area where the line has sought to be abandoned, and said the system revenue of previous years was an "indication that the need for transportation in the area is not undergoing an immediate decline." (320 I. C. C. 23.)

Obviously, system results cannot be used where there is direct and uncontradicted evidence that transportation in the area is undergoing a substantial decline.

## Conclusion.

By reason of the foregoing, the Petition for Rehearing should be granted, the judgment below should be reversed and the order of the Interstate Commerce Commission be set aside.

Respectfully submitted,

RANDOLPH KARR,
*Attorney for Appellant.*

## Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

RANDOLPH KARR
*Attorney for Appellant*

## Certificate of Service.

I, Randolph Karr, attorney for Northwestern Pacific Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of December, 1964, at Los Angeles, Calif., I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid to The Solicitor General, William H. Orrick, Jr., Esq., Assistant Attorney General, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D.C., and with airmail postage prepaid to Cecil F. Poole, Esq., United States Attorney, for the Northern District of California, at Room 422 Post Office Building, San Francisco, California.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Robert S. Burk, Esq., its Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On the Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc.; Chris-Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., intervening

defendants, by mailing copies in a duly addressed envelope, with airmail postage prepaid to their respective attorneys of record:

Graham, James & Rolph,
Boris H. Lakusta, Esq.
E. Myron Bull, Jr., Esq.
310 Sansome Street
San Francisco 4, California

4. On The People of the State of California and The Public Utilities Commission of California, intervening defendants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys of record:

Richard E. Tuttle, Esq.
Hector Anninos, Esq.
State Building
San Francisco, California

and The Atchison, Topeka and Santa Fe Railway Company, intervening defendant, by mailing copy in duly addressed envelope, with airmail postage prepaid, to its attorney of record:

Frederick G. Pfrommer, Esq.
114 Sansome Street
San Francisco, California.

RANDOLPH KARR